S. HRG. 103–1077

THE FOREIGN SOVEREIGN IMMUNITIES ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS AND ADMINISTRATIVE PRACTICE

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

S. 825

A BILL TO AMEND TITLE 28 OF THE UNITED STATES CODE TO PERMIT A FOREIGN STATE TO BE SUBJECT TO THE JURISDICTION OF FEDERAL OR STATE COURTS IN ANY CASE INVOLVING AN ACT OF INTERNATIONAL TERRORISM

JUNE 21, 1994

Serial No. J–103–62

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

PROPOSED LEGISLATION

CHRONOLOGICAL LIST OF WITNESSES

ALPHABETICAL LIST AND MATERIAL SUBMITTED

APPENDIX

QUESTIONS AND ANSWERS

ADDITIONAL SUBMISSIONS FOR THE RECORD

THE FOREIGN SOVEREIGN IMMUNITIES ACT

TUESDAY, JUNE 21, 1994

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:09 a.m. in room SD–226, Dirksen Senate Office Building, Hon. Howell Heflin (chairman of the subcommittee), presiding.

Present: Senators Grassley, and Specter (ex officio).

OPENING STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. The hearing will come to order. This hearing has been called as a forum by which representatives from the U.S. Government, as well as U.S. citizens, can discuss the current state of law regarding jurisdictional immunities of foreign States.

I understand the sensitive nature of any change in this law due to the effect that it may have on international policies of this or any other administration. Nevertheless, it cannot be ignored that acts of terrorism have been inflicted upon U.S. citizens by agents of governments in foreign countries in increasing number and severity.

The dramatic changes in the world today and the globalization of our economy should be taken into account as we consider modifications which can influence international laws. With the end of the cold war in Europe and emerging Third World countries, there have materialized many new alliances and political extremists which may affect the safety and security of U.S. citizens who participate in the growing world markets abroad.

This emergence of political extremists is not only visible in the more volatile regions of the world, but also within our own borders, as witnessed by the bombing of the World Trade Center in New York. Several of the witnesses who will testify today have survived some of the most psychologically and physically painful ordeals that one can imagine. These outrageous events were supported by governments which flagrantly disregarded international laws and basic human rights.

Unfortunately, the victims have very few legal remedies available to them. Presently, Federal law does not permit a U.S. citizen to pursue a civil action against a foreign government in a State or Federal court in the United States in cases in which torture or other egregious violations of human rights have occurred outside the United States.

The Foreign Sovereignty Immunities Act only allows claims to be decided by Federal and State courts for actions which arise outside the United States in the form of commercial disputes. The bill introduced by Senator Specter would expand exceptions in the present act. It would enable a U.S. citizen or permanent resident to pursue cases which involve terrorist actions against them which are violent to human life and violate the criminal laws of the United States.

Senator Specter has introduced a bill in the Senate which addresses the issue of foreign immunity and terrorist actions. First, this legislation would permit a foreign State to be subject to the jurisdiction of Federal or State courts for acts which occur outside the United States. It would create a new exception to jurisdictional immunity in cases which involve an act of international terrorism by a foreign State linked to that specific act. Also, the country which is linked to the terrorist act must be designated by the Secretary of State as a country which supports terrorism.

This legislation would expand the present jurisdiction of courts. Therefore, it falls within the purview of the Subcommittee on Courts and Administrative Practice. I acknowledge that in the past it has been almost exclusively the executive branch, through the State Department which has the responsibility to pursue remedies for kidnap and torture victims through diplomatic channels. But with the passage by the Congress of the Torture Victim Protection Act last year, more jurisdiction has been granted to the judicial branch to allow victims due process through our courts.

It is with this idea in mind that we focus our attention on today's hearing. I look forward to your sharing with me and my colleagues your expertise and your own experiences. I thank all of the witnesses for taking the time to be with us here today and for their thoughtful testimony.

At this time, Congressman Mazzoli, if you will come forward? Congressman Mazzoli is a Representative from Kentucky in the U.S. House of Representatives. We are glad to have you, Congressman.

STATEMENT OF THE HON. ROMANO L. MAZZOLI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KENTUCKY

Representative MAZZOLI. Thank you very much, Senator Heflin. I appreciate the opportunity to join you and I would ask that my full statement be made a part of the record.

Senator HEFLIN. It will be so made.

Representative MAZZOLI. Mr. Chairman, I wish to commend you for holding this hearing on S. 825, which is Senator Specter's bill to amend the Foreign Sovereign Immunities Act, and also to commend Senator Specter, though he is not yet here today, for his excellent work on this subject.

The Senator and I are both interested in amending the Foreign Sovereign Immunities Act in slightly different ways, but the essence is to provide U.S. citizens who have been subjected to grievous physical abuse, whether, as in Senator Specter's bill, by acts of terrorism, or in the House version which I have more or less authored, by torture, extrajudicial killing or genocide, sponsored by

officers of a foreign government, an opportunity to obtain remedy for these injuries.

Unfortunately, Mr. Chairman, there are still too many countries which engage in gross violations of human rights—once again, torture, killing, terrorism. In recent years, several U.S. citizens have been victimized abroad by agents of foreign governments engaged in these kinds of practices.

Often, Senator Heflin, judicial remedies are not available in the country where the harm occurs. Unlike our own legal system which is characterized by due process, right to counsel, an independent judiciary, and respect for human and civil rights, many countries have legal systems which do not provide these protections to their own citizens, and certainly not to visitors from other countries.

U.S. citizens who are physically abused by a foreign government can, of course, attempt to enlist the help of the U.S. State Department in pursuing remedies through diplomatic channels. Often, citizens have their injuries and grievances redressed with assistance from the State Department, but because the State Department must often execute foreign policy with the very governments and the very people who are accused of mistreating our citizens, the State Department often cannot effectively protect and enforce the rights of these citizens.

Simply stated, its stance is compromised because of foreign policy considerations in too many instances. At least in one case, the State Department actually sided with a foreign sovereign against an aggrieved U.S. citizen, and that is a case recently decided by the U.S. Supreme Court which overturned an eleventh circuit court of appeals decision involving the Kingdom of Saudi Arabia.

Our constituents should not have to be treated like pawns in some larger game of global diplomacy. Our constituents who have been injured by a foreign government should have their grievances heard in a court which offers them suitable protections rather than having to rely upon diplomatic efforts mounted by the executive branch of our Government.

Senator in fact, this is the original reason for the FSIA which was passed back in 1976, and that is to have the courts, not the executive branch, determine whether or not a foreign sovereign should be entitled to immunity from suit in the United States. The Foreign Sovereign Immunities Act currently allows U.S. citizens to sue foreign governments for commercial disputes that arise outside the United States, but it does not allow suits for physical violence, such as torture or murder or, in the case of Senator Specter's bill, terrorism which occurs abroad.

If we allow a businessman or woman to bring suit under the FSIA against a foreign government which has breached a contract, it seems logical that we should allow a citizen who was tortured or otherwise physically mistreated by the very self same government to bring suit under the act.

I do not believe that the United States has the right to impose all of its domestic laws and constitutional rights on the rest of the world. However, if a Nation violates international law by torturing or murdering a U.S. citizen, that Nation has an obligation under international law to provide a remedy, and if the Nation fails to

provide such a remedy, the U.S. citizen should be entitled to bring suit against the foreign government in a U.S. court.

This, of course, is the driving principle behind the House bill, H.R. 934, which was approved by the subcommittee I am privileged to chair, the House Subcommittee on International Law, Immigration and Refugees, and that approval came in September of 1993. A bill, I might say, Senator, virtually identical to this bill was adopted by the full committee in the previous Congress, but it did not reach the House floor.

Our bill, H.R. 934, will ensure that a U.S. citizen who has been tortured or murdered abroad by agents of a foreign government will have a remedy against the foreign government for damages either in the country where the conduct occurred or here in the U.S. H.R. 934 would add a new exception to the FSIA which would allow U.S. citizens who are subjected to torture, extrajudicial killing, summary execution, as it is called, or genocide abroad by a foreign sovereign to bring suit against the foreign sovereign, but only if the citizen is denied adequate remedies in the country where the conduct occurred. In effect, we have an exhaustion of remedies provision.

The bill is limited to causes of action for torture, extrajudicial killing, and genocide, all of which are violations of international law. Therefore, under H.R. 934, we will not be imposing our own law on other countries, but will simply be providing a forum to redress an internationally-recognized wrong.

I applaud Senator Specter for his work on S. 825, the bill before you, Senator Heflin. His bill differs from ours in that it focuses more on terrorism, where ours is somewhat broader in the nature of the grievances to the U.S. citizens. But he and I are of a mind that some action needs to be taken where citizens come into legal collision with foreign sovereigns.

I would certainly be open to examining whether it might be possible to include acts of terrorism in our bill. Senator Specter's bill allows suits only against countries, and you said this earlier, Mr. Chairman, which are on the State Department's terrorism list. That seems to be somewhat limited because it seems to me once again that to allow the executive branch of Government to make the decision of which countries would be subject to the foreign sovereign immunity sort of flies in the face of the FSIA and its underlying premise, which is to allow the courts to make the decision of which countries could be subject to these suits.

However, I am confident that our differences, such as they are and minor as they are, can be worked out, and I look forward to cooperating with Senator Specter and you, Mr. Chairman, and all members of your distinguished subcommittee to see foreign sovereign immunities legislation enacted into law this Congress.

Governmental torture and killing will not go away. Abuse of our citizens could probably increase, rather than decrease, as our economy becomes more globalized and increasing number of our citizens have contact with foreign governments. The United States is a leading Nation in the world and now it is time for the United States to demonstrate that international law indeed means something and that the right of our citizens to be free from government-sponsored torture and killing will be enforced.

Again, Senator, I thank you very much for the opportunity and commend you for having the hearing and wish you good fortune on adopting some form of legislation.

Senator HEFLIN. Congressman, a later witness, Mr. Hugo Princz, will testify. I understand that he and his family were American citizens residing in Europe during World War II. In 1942, the Nazis arrested him, ignoring his and his families' valid U.S. passports, which would have made them part of an International Red Cross civilian prisoner exchange then underway on the grounds that they were Jewish Americans. Instead, they deported them to concentration camps where they were all exterminated, except for Mr. Princz. He was liberated in 1945 by U.S. Army personnel, who recognized him as an American by the "USA" that was stenciled on his camp garb by the German authorities.

He has undertaken, as I understand it, a number of efforts to try to be able to get remedies through the German courts, but because of the language of the German courts he was a rare exception and therefore could not come under their criteria.

Your bill would, in effect, remedy his situation and would give him a cause of action, as well as any others who were American citizens who were subject to that type of treatment.

Representative MAZZOLI. I would have to check with the staff, Mr. Chairman, but I think there is a statute of limitations in our bill that could apply in Mr. Princz' case. Of course, he suffered quite grievously, to say the least, and our hearts go out to the suffering that he has had, and his whole family.

It would seem to me that we do need to be somewhat cautious in framing a bill to make sure that we don't open gigantic chapters of world history again. Again, I believe that our bill does have a 10-year statute of limitations which possibly could bar Mr. Princz from pursuing his claim.

Senator HEFLIN. All right, sir. Well, we appreciate your testimony. Senator Specter is being delayed by action on the floor. He is on the floor right now today, and so I am sure that if he gets through with his activity there, he will come and participate in this hearing, since he has pressed me very hard to have this hearing.

Thank you.

Representative MAZZOLI. Thank you, Mr. Heflin, and give my best to Senator Specter.

[The prepared statement of Representative Romano L. Mazzoli follows:]

PREPARED STATEMENT OF REPRESENTATIVE ROMANO L. MAZZOLI

Mr. Chairman, I want to commend you for holding this hearing on S. 825, Senator Specter's bill to amend the Foreign Sovereign Immunities Act, and also want to commend Senator Specter for his work on this issue.

Senator Specter and I are both interested in amending the Foreign Sovereign Immunities Act (FSIA) to provide to U.S. citizens who have been subjected to grievous physical abuse by officers of a foreign government an opportunity to obtain a remedy for their injuries.

Unfortunately, there are still too many countries which engage in gross violations of human rights such as torture, extrajudicial killing and genocide. In recent years, several U.S. citizens have been victimized abroad by agents of foreign governments engaging in these types of practices.

Often judicial remedies are not available in the country where the harm occurred. Unlike our own legal system, which is characterized by due process, right to coun-

sel, an independent judiciary, and respect for human and civil rights, many countries have legal systems which do not provide these protections to their own citizens, much less to citizens of other countries.

U.S. citizens who are physically abused by a foreign government can, of course, attempt to enlist the help of the U.S. State Department in pursuing a remedy through diplomatic channels. Often these citizens have their injuries and grievances redressed with assistance from State Department intervention.

But, because the State Department must execute foreign policy with the very governments which are accused of mistreating our citizens, it often cannot effectively protect and enforce the rights of these citizens. Simply stated, its stance is often compromised because of foreign policy considerations.

And, remarkably enough, the State Department will even side with the foreign sovereign against the citizen interest. In one recent case, the State Department filed a brief before the U.S. Supreme Court asking the Court to overturn an 11th Circuit Court of Appeals decision which had allowed a U.S. citizen to sue the Kingdom of Saudi Arabia for torture-related damages under the FSIA.

Our constituents should not have to be treated like pawns in some larger game of global diplomacy. Our constituents who have been injured by a foreign government should have their grievances heard in a court which offers suitable protections rather than having to rely upon diplomatic efforts mounted by the executive branch of our government.

In fact, this was the original reason the FSIA was passed back in 1976—to have the courts, and not the executive branch, determine whether or not a foreign sovereign should be entitled to immunity from suit in the United States.

As the House Judiciary Committee's Report to the FSIA states:

> A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity.

The FSIA currently allows U.S. citizens to sue foreign governments for commercial disputes that arise outside the United States. But it does not allow suits for physical violence, such as torture or murder, which occurs abroad. If we allow a businessman to bring suit under the FSIA against a foreign government which has breached a contract, why should we prevent a citizen who was tortured or otherwise physically mistreated by the very same foreign government from bringing suit?

I do *not* believe that the United States has the right to impose all of its domestic laws and constitutional rights on the rest of the world. However, if a nation violates international law by torturing or murdering a U.S. citizen, that nation has an obligation under international law to provide a remedy. If the nation fails to provide such a remedy, the U.S. citizen should be entitled to bring suit against the foreign government in a U.S. court.

This is the driving principal behind my bill, H.R. 934. H.R. 934 was approved by the House Subcommittee on International Law, Immigration, and Refugees, which I chair, on September 8, 1993. A bill virtually identical to H.R. 934 was approved by the House Judiciary Committee last Congress, but never reached the House floor.

H.R. 934 will ensure that a U.S. citizen who has been tortured or murdered abroad by agents of a foreign government will have a remedy against the foreign government for damages either in the country where the conduct occurred or here in the United States.

H.R. 934 would add a new exception to the FSIA which would allow U.S. citizens who are subjected to torture, summary execution, or genocide abroad by a foreign sovereign to bring suit against the foreign sovereign, but only if the citizen is denied adequate remedies in the country where the conduct occurred.

H.R. 934 is narrowly tailored. The bill only applies to persons who were U.S. citizens at the time that they were abused by the foreign government.

The bill is limited to causes of action for torture, extrajudicial killing, and genocide, all of which are violations of international law. Therefore, under H.R. 934 the U.S. will not be imposing its own law on other countries, but will simply be providing a forum to redress an internationally-recognized wrong.

The exhaustion of remedies requirement in the bill requires the plaintiff to prove that there are no adequate and available remedies in the country where the conduct occurred, or to prove that he or she has exhausted all available remedies, before the

plaintiff can file suit in the United States. Therefore, if the foreign country provides an adequate remedy, it will not have to submit to the jurisdiction of U.S. courts.

H.R. 934 is modeled after the Torture Victim Protection Act (TVPA), which was signed into law last Congress. The TVPA only provided a cause of action against officials of foreign states—it did not address the liability of the foreign state itself. Many U.S. citizens will not be able to use the TVPA because they will not be able to obtain personal jurisdiction over their individual torturers.

Like the TVPA, H.R. 934 defines torture in accordance with the Convention against Torture. The United States signed the Convention in 1988, the Senate approved it in 1990, and just recently, April 30, 1994, President Clinton signed into law the implementing legislation for the Convention. Likewise, extrajudicial killing is defined in accordance with the TVPA and the Geneva Conventions of 1949.

H.R. 934 contains the same 10 year statute of limitations as the TVPA. Although the amendments made by the bill will apply to causes of action that arise before the bill's enactment, causes of action arising before the bill's enactment will still have to meet the statute of limitations.

At Subcommittee, at the urging of Congressman Chuck Schumer, the bill was amended to include acts of genocide committed by a foreign sovereign. Although not part of the TVPA, Genocide is also a grievous violation of international law. Under the bill, genocide is defined in accordance with the Genocide Convention and the criminal provisions of U.S. law which implement that Convention. Acts of genocide are not subject to the 10 year statute of limitations.

Incidently, I think at some point Congress should examine the possibility of harmonizing some of these various statutes which impose civil and criminal liability for various human rights violations. Currently on the books we have the Foreign Sovereign Immunities Act, the Torture Victim Protection Act, laws implementing various treaties such as the Torture and Genocide Convention, as well as several others.

I think Congress should examine all of these various laws and consider whether they could be combined into one single, comprehensive statute. While I will not be around Capitol Hill to help make this happen, I think it is something that Congress should seriously pursue.

I applaud Senator Specter for his work on S. 825. Senator Specter's bill differs from H.R. 934 in that his bill focuses more on terrorism whereas my bill focuses on torture and extrajudiciai killing. But we are of a mind that some action needs to be taken where citizen come into legal collision with foreign sovereigns. I would certainly be open to examining whether it might be possible to include acts of terrorism committed against U.S. citizens within the framework of my bill.

One provision in Senator Specter's bill that does concern me is the provision which allows suits only against countries who are on the State Department's terrorism list. For reasons I gave earlier, I think we should let courts, not the executive branch, make immunity determinations. If we allow the executive branch to make immunity determinations by placing or taking countries off lists we will defeat the original purpose of the FSIA.

However, I am confident our differences can be worked out and I look forward to working with Senator Specter and you, Mr. Chairman, and all the Members of the Subcommittee, to see foreign sovereign immunities legislation enacted into law.

Governmental torture and killing will not soon go away. Abuse of our citizens will probably increase, not decrease, as our economy becomes more globalized and increasing numbers of our citizens have contact with foreign governments.

In the aftermath of the Cold War, the United States is unquestionably the leading country in the world. Now is the time for the United States to demonstrate that international law means something and that the right of our citizens to be free from governmental torture and killing will actually be enforced.

Chairman Heflin, I want to thank you once again for holding this hearing and inviting me to testify.

Senator HEFLIN. Next is a panel of Mr. Stuart Schiffer, who is Deputy Assistant Attorney General, U.S. Department of Justice, and Ms. Jamison Borek, who is the deputy legal adviser for the U.S. Department of State.

Mr. Schiffer, I understand you don't have too much testimony, but go ahead, sir.

PANEL CONSISTING OF STUART SCHIFFER, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE; AND JAMISON S. BOREK, DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE

STATEMENT OF STUART SCHIFFER

Mr. SCHIFFER. I won't even have to summarize. It was short enough, but I will make just a few remarks, if I may.

I want to emphasize at the start that we share fully the values and the concerns that underlie S. 825. While I don't appear here in my personal capacity, I think I do have to say that my heart goes out to the witnesses who are going to appear before you shortly who indeed did suffer.

It was in the spirit that we worked with the Congress in 1991 and 1992 on legislation which became law to protect victims of unconscionable violence abroad. This legislation created civil remedies for acts of terrorism and acts of torture. At the same time, I must note that we concurred in the views of the Department of State, and ultimately of the Congress, that extension of these civil remedies to the foreign governments themselves in our courts would go beyond recognized international practice and would have created substantial foreign relations concerns.

Congress, as I said, excepted from the reach of these civil actions suits against the foreign governments, as opposed to individuals. We continue to believe that the State Department is correct in its view that it would be no less unwise to expand such causes of action now to foreign governments.

Again, I emphasize that we are steadfast in our resolve to act against terrorism. We have shown that, I think, not only in our cooperation with the Hill, but in prosecutions that have been brought and continued to be brought in our courts. We simply, if we question anything, question the efficacy of the cause of action that this bill would create. Again, we share in the concerns that my colleague, Ms. Borek, can address about the foreign relations problems this remedy might create.

Let me make only two brief points before I conclude and defer to my colleague. First, the Foreign Sovereign Immunities Act was indeed very progressive legislation when it was enacted in 1976. We believe that it remains so today. As Congressman Mazzoli suggested, it replaced what was essentially ad hoc justice where the courts deferred to State Department determinations with rules of law that were to be applied by our courts and have been applied in dozens and dozens of cases since enactment.

The drafters recognize and we continue to recognize that the act was not intended to create domestic judicial remedies for all injuries which might be suffered by potential plaintiffs. The principal purpose of the act was to codify the so-called restrictive theory of sovereign immunity under which foreign Nations would continue to enjoy immunity for sovereign acts, but would be liable for commercial activities carried out in this country or having significant effects in this country.

Remedies for tortious conduct really were not at the heart of the bill. In fact, the drafters, working with the executive branch, hesitated before creating any jurisdiction in our courts over torts. When

they did so, they made clear in the legislative history that they had in mind essentially garden-variety torts, such as automobile accidents.

That brings me to my second and final point. It is very important to keep in mind that no Nation has abroad as much property and the significant numbers of personnel that we do. As we create new jurisdiction in our courts, we have to bear in mind that we expose ourselves to the creation of new remedies which will be used against us in foreign courts.

I emphasize we obey the rule of law abroad just as we do in this country. We presently have pending well over 1,000 suits in about 80 countries of every stripe throughout the world, and I simply think we have to keep in mind that not all foreign countries are as careful in tailoring legislation as we are. But reciprocity plays a very strong role in foreign relations, in general, and it specifically does so in the area of foreign State immunity. Our bill has served as a model for other governments and I think we have to give at least some pause before we become too innovative in enacting such remedies.

At this point, I will defer to my colleague, Ms. Borek.

[The prepared statement of Stuart Schiffer follows:]

PREPARED STATEMENT OF STUART SCHIFFER

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: I am pleased to appear before you today in response to your request for the views of the Department of Justice on S. 825, a bill to amend the Foreign Sovereign Immunities Act.

S. 825 would amend the Foreign Sovereign Immunities Act to permit a foreign state to be subject to the jurisdiction of courts in the United States in suits based upon an act of international terrorism, committed or aided or abetted by certain foreign states, when the suit seeks money damages for personal injury or death to a United States citizen or permanent resident alien. The bill also permits pre-judgment attachment and execution of foreign state property when a suit is filed and judgment obtained pursuant to its provisions.

The Department of Justice has been and remains in the forefront in the fight against international terrorism. We have vigorously prosecuted, and continue to prosecute, those subjecting our citizens to terrorist acts. We have also worked in partnership with the Congress in crafting legislation to protect victims against unconscionable violence. The provision of civil remedies for acts of terrorism, which was contained in the Federal Courts Study Committee Act of 1992, codified at 18 U.S.C. § 2333 *et seq.*, and the Torture Victim Protection Act of 1991 signal the joint commitment of Congress and the Executive Branch to provide to our injured citizens means of legal redress if they are the victims of terrorism or torture.

To the extent that S. 825 would affect the foreign relations interests of the United States by expanding the jurisdiction of our courts over foreign states, the Department of Justice defers to the comments of the State Department on the substance of the bill. The Foreign Sovereign Immunities Act provides for jurisdiction in suits against foreign states in which the action is based upon a commercial activity carried on in the United States by the foreign state, or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere, or upon an act outside the territory of the Unites States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. Jurisdiction over torts not meeting these conditions exists, subject to certain exceptions, only when both the tortious act and the injury occur within the United States. Jurisdiction over suits alleging acts of deliberate government wrongdoing would have political significance and consequences with foreign policy ramifications which are best addressed by the Department of State.

In evaluating S. 825, we note the risk of reciprocal treatment by foreign states if we expand our jurisdiction over them. While the current bill is carefully limited to terrorist acts, we could not be confident that legislation enacted by other states would be as carefully and finely drawn. If other states were to expand the jurisdic-

tion of their own courts, they might sweep more broadly into areas which we consider to be properly immune from their jurisdiction.

Furthermore, S. 825 seeks to limit the immunity from pre-judgment attachment and execution of foreign state property by making property of the foreign state, used for a commercial activity in the United States, available to satisfy tort judgments obtained under the bill. Due to foreign relations concerns, the availability of pre-judgment attachment against property of foreign states is extremely limited. In addition, the Act presently allows for execution of judgments on foreign state property "used for the commercial activity upon which the claim is based." The bill proposes to extend execution under the Act to reach any commercial property of the foreign state, and to do so in the context of a tort judgment.

We should be aware that enlarging the category of property available for pre-judgment attachment and execution in the United States in the United States invites similar treatment by other countries where our assets may be located. The breadth of our government's involvement in litigation in foreign courts and the vast amounts of U.S. government property located abroad give us greater risk of exposure than any other country in the world.

Once again, let me emphasize the resolve of the Department of Justice to combat terrorism, and to do so with all the appropriate tools at our disposal. I appreciate the opportunity to present the Department's views, and will be pleased to answer any of your questions.

Senator HEFLIN. Ms. Borek?

STATEMENT OF JAMISON S. BOREK

Ms. BOREK. Thank you, Mr. Chairman. We appreciate the opportunity to present our views on S. 825 today and this difficult question. I will give only a summary of my testimony and would ask that the full testimony be accepted for the record.

Senator HEFLIN. It will be so entered.

Ms. BOREK. We share very much the concerns of the subcommittee and others who will speak today over State-sponsored terrorism and the other grievous acts which may be committed. Nonetheless, as Mr. Schiffer has indicated, we do not believe it would be wise to enact this amendment to the Foreign Sovereign Immunities Act. Despite its appeal, the bill raises substantial concerns in several areas.

At present, the Foreign Sovereign Immunities Act provides for jurisdiction over certain noncommercial torts that occur within the United States. This cautious approach is consistent with international law and with the practices of other States. We are not aware of any case in which a State permits jurisdiction over such tortuous conduct outside its own territory.

I might add on the commercial exception, as well, this is not wide open. It conforms to the general understanding of when jurisdiction is permissible over commercial acts, and this requires that there be a direct effect on the United States. So it is not a wide open exception.

S. 825 would permit actions against certain foreign States for terrorist acts committed anywhere in the world. We recognize and appreciate that a great effort was made to craft this very narrowly. Nonetheless, it still goes well beyond our existing statute and diverges significantly from State practice.

This expansion beyond established international practice would tend to erode the credibility and workability of the Foreign Sovereign Immunities Act. In the beginning, one of the great efforts, and it continues to be an effort, is to convince foreign governments that they really do have to go into our courts and defend themselves against charges. In the international view, the courts of a

country may be regarded as not very much different from the government of the country, and in many countries this may be much more fair than it is in the United States.

The problems could be exacerbated where alleged deliberate governmental wrongdoing is involved. It is very difficult ultimately to get a government to admit and pay for deliberate governmental wrongdoing, and this is true whether you are pursuing the claim in diplomatic channels or whether you create a cause of action.

Civil suits could also inject an unpredictable element into delicate relationships and could complicate the achievement of U.S. counter-terrorism objectives. When you have a delicate negotiation with a terrorist country—for example, North Korea or Syria—which has a significant number of issues which are presented and which are very important in the overall foreign policy scheme, threatened litigation, actual litigation, problems of discovery, and ultimately judgments can complicate the achievement of U.S. objectives.

Fundamentally, as well, I would note that there is really a question about the efficacy of such a remedy. These countries are not countries which are likely to have assets in the United States, and if they do, they may very well be frozen with thousands of other U.S. citizen claims also outstanding against them. Even in the case of nonterrorist countries, there is a difficulty that exposure to litigation and to execution and attachment can encourage countries not to leave money in the United States.

The execution provision therefore also presents concerns. Execution of foreign State property is an area of particular sensitivity. At present, State property is generally not available for execution to satisfy noncommercial tort judgments against a foreign State itself. S. 825 would open this up for execution in terrorism cases.

The potential difficulties created by having worldwide jurisdiction are compounded by this expanded execution. Moreover, in cases involving deliberate governmental wrongdoing, domestic measures directed against property will involve likely particular sensitivity, given the potential for retaliation and disruption of relations.

We have concerns also about the provision for prejudgment attachment as one of the countries which has so many assets throughout the world. At present, we and other countries have required that there be an actual waiver in order to attach property prior to litigation or waiver from the foreign government which owns the property. S. 825 would eliminate the need for waiver. Again, the problems that are associated with the worldwide jurisdiction compound this difficulty. Most countries will regard this as extreme, and to add attachment to it will make it only more extreme, especially since attachment occurs in a case at a point in which there is no determination as to liability.

In short, we do believe that people should have remedies. We do try to pursue remedies in these cases. The fundamental difficulty is that governments are often not willing to pay or expose themselves to paying for alleged deliberate wrongdoing, especially when it carries a label, such as terrorism, torture, genocide. Unfortunately, this is one of the difficulties that is inherent in the nature of the situation and in the nature of international politics.

Having this remedy will be very difficult, I think, from the legal point of view. Even countries which are sympathetic to the objectives will find the extraterritoriality quite extreme and it will make it more difficult to work with the Foreign Sovereign Immunities Act and with other countries to consolidate the established concerns that we have reflected in the act today.

Thank you.

[The prepared statement of Jamison S. Borek follows:]

PREPARED STATEMENT OF JAMISON S. BOREK

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE: I appreciate the opportunity to appear before you today to discuss the views of the Department of State on S. 825. This bill would amend the Foreign Sovereign immunities Act of 1976 (the FSIA) to provide for jurisdiction in U.S. courts in certain cases involving acts of international terrorism.

At the outset, I would like to emphasize the resolve of the Department of State in combatting state-sponsored terrorism. Important tools under U.S. law include the cutoff of foreign assistance and other strong economic sanctions against countries designated as state sponsors of terrorism. We are a leader at the United Nations and elsewhere in marshalling international efforts to combat state-sponsored terrorism, including the unprecedented economic sanctions imposed on Libya by the UN Security Council for its role in the Pan Am 103 bombing. In addition, working closely with the Department of Justice and with numerous cooperative foreign governments, we are vigilant in bringing to justice individuals who commit acts of terrorism.

The bill this Subcommittee is considering would amend a statute that was enacted in 1976 after several years of work by the Executive Branch and both Houses of Congress. The effort that went into the formulation of the FSIA reflects both the political sensitivity and the legal complexity involved in the area of foreign sovereign immunity.

Fundamental principles of sovereignty and international law are implicated in determining the extent to which foreign states should be responsible to private persons in the courts of other states. Moreover, our treatment of foreign states here can have an impact upon the treatment of the U.S. Government abroad. Not only do we look to the FSIA as a guide in asserting our own immunity abroad, but foreign states themselves may well apply our standards against us as a matter of reciprocity. For these reasons, we have always considered the proper treatment of foreign sovereigns in our courts to be a matter of great importance to the conduct of our foreign relations.

In crafting the FSIA, Congress and the Executive Branch created a carefully balanced structure that provides immunity in some cases and exceptions to immunity in others. The statute reflects not only a recognition of the foreign relations interests involved but also a fundamental concern for international law and practice. One of the main purposes of the FSIA, in fact, was to codify the "restrictive" principle of sovereign immunity as recognized in international law. This principle, which permits suits in commercial matters, is important to our international economic interests.

The FSIA has been largely successful in achieving its objectives. We believe revision of the statute should be approached with great caution. Of course we have supported proposals to amend the statute when we believed they were warranted, and some of those proposals were ultimately enacted. This was the case, for example, with the provisions that now address the enforcement of arbitration agreements and awards. However, we have also opposed suggested revisions of the FSIA when we believed that they could have an uncertain or potentially damaging effect on our broader interests and the need for the changes had not been adequately demonstrated. Two years ago, for example, we opposed an amendment that would have expanded the jurisdiction of our courts to reach cases involving tortious acts or omissions committed by a foreign state or its officials within its own territory.

We recognize that some proposed amendments to the FSIA have a special appeal because they reflect deeply held values and important policies that we seek to promote in other ways in our foreign relations. S. 825, which focuses on terrorism, is an example. Another example is the bill presently pending in the House, H.R. 934, which focuses on torture, extrajudicial killing and genocide. In evaluating these or other proposed amendments, however, we believe we should keep in mind the fun-

damental interests that our law on foreign sovereign immunity is designed to advance and the careful balances reflected in that law.

With this background, I would like now to address S. 825. This bill would amend Section 1605(a) of the FSIA to provide for the jurisdiction of U.S. courts in cases in which the action is based upon an act of international terrorism which occurs within the United States or which occurs outside the United States if certain conditions are met. These conditions include the requirements that the action must be one for injury or death to a United States citizen or permanent resident alien and that the foreign state involved must be one that has been designated by the Secretary of State as a state which has repeatedly provided support for acts of international terrorism.

The bill would also amend Section 1610(a) of the FSIA to provide for execution against property of the foreign state in such cases; no nexus between the cause of action and the property would be required. In addition, the bill would amend Section 1610(d) of the FSIA to provide for pre-judgment attachment of the foreign state's property in such cases even in the absence of an explicit waiver by the foreign state.

I would like to address each of these aspects in turn.

JURISDICTION

The proposed amendment to Section 1605(a) of the FSIA presents serious concerns. Our concerns are best understood by considering first the scope of the exception for torts which are not of a commercial nature, as it is presently contained in the FSIA, as well as general international practice in this area.

The non-commercial tort exception was enacted as Section 1605(a)(5) of the FSIA in 1976. It is only available for torts occurring in the United States. When the FSIA was being drafted, there was some question as to whether even this limited exception to immunity provided a new remedy not available under international law. In supporting the denial of immunity for many torts that occur in the United States, however, the Department's Legal Adviser observed that the tort provision, as drafted, had a substantial basis in international practice.

The House Report (No. 94–1487) that accompanied the FSIA specifically noted (pp. 20–21) that the tortious act or omission of the foreign state must occur within the jurisdiction of the United States. The Report made clear the narrow focus of Congressional concern in this area: "Section 1605(a)(5) is directed primarily at the problem of traffic accidents * * *. The purpose of section 1605(a)(5) is to permit the victim of a traffic accident or other noncommercial tort to maintain an action against the foreign state to the extent otherwise provided by law."

The territorial limitation of this exception to immunity was also emphasized by the Supreme Court in its 1989 decision in *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 439–40 (1989). The Court stated that "Section 1605(a)(5) is limited by its terms, however, to those cases in which the damage to or loss of property occurs *in the United States.* Congress' primary purpose in enacting § 1605(a)(5) was to eliminate a foreign state's immunity for traffic accidents and other torts committed in the United States, for which liability is imposed under domestic tort law." (emphasis in original)

The cautious approach reflected in the present non-commercial tort exception is consistent with general state practice in this area. We are not aware of any instance in which a state permits jurisdiction over such tortious conduct of a foreign state without territorial limitations. The sovereign immunity statutes of Australia and the United Kingdom, for example, expressly require that the tortious act or omission for which immunity is denied must occur in the forum state. Article 11 of the European Convention on State Immunity, to which a number of European states are party, denies immunity "if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred."

The International Law Commission's Draft Articles on Jurisdictional Immunities of States and their Property, which has been considered by a Working Group of the Sixth Committee of the United Nations General Assembly, is also instructive on the issue of state practice. Article 12 of the International Law Commission's Draft provides:

> Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to pecuniary compensation for death or injury to the person, or damage to or loss of tangible property, caused by an act or omission which is alleged to be attributable to the State, if the act or omission occurred in whole or in part in the territory

of that other State and if the author of the act or omission was present in that territory at the time of the act or omission.

The International Law Commission's Commentary to Article 12 specifically stressed territoriality as the basis for the assumption and exercise of jurisdiction in cases covered by this provision.

It is against this backdrop that the proposed amendment to Section 1605(a) of the FSIA must be considered. That amendment would permit actions in the United States against certain foreign states for terrorist acts committed anywhere in the world. Not only does such a provision extend well beyond the reach of our existing statute, but it also diverges significantly from the general practice of states, as described. We fully share the concerns over terrorism that underlie this proposal, but we do not believe such an expansion of the jurisdiction of our courts would be prudent.

Consistency of the FSIA with established international practice is important. If we deviate from that practice and assert jurisdiction over foreign states for acts that are generally perceived by the international community as falling within the scope of immunity, this would tend to erode the credibility of the FSIA. We have made substantial efforts over the years to persuade foreign states to participate in our judicial system—to appear and defend in actions against them under the FSIA. That kind of broad participation serves the interests of all. If we expand our jurisdiction in ways that cause other states to question our statute, this could undermine the broad participation we seek. It could also diminish our ability to influence other countries to abandon the theory of absolute immunity and adopt the restrictive view of sovereign immunity, which the United States has followed for over forty years.

These problems could be exacerbated where the divergence from state practice concerned alleged deliberate governmental wrongdoing. Domestic judicial proceedings designed to respond to such action would necessarily involve particular sensitivity, especially when a violation of important rules of international or domestic law was alleged. States are generally reluctant to enter into the domestic courts of another state to defend themselves against charges of serious violations of law.

This bill could also lead to other undesirable consequences for our foreign relations. Current U.S. law allows the U.S. Government to fine-tune the application of sanctions against state-sponsors of terrorism, increasing them or decreasing them when in the national interest. In addition, the U.S. Government frequently coordinates closely with other nations at the UN and elsewhere on the imposition of sanctions and the development of joint positions vis-a-vis acts of terrorism. The possibility of civil suits and potential judgments against state-sponsors of terrorism would inject a new unpredictable element in these very delicate relationships. Such proceedings could in some instances interfere with U.S. counter-terrorism objectives. They could also raise difficult issues involving sensitive intelligence and national security information.

We recognize that S. 825 contains some elements that would limit the adverse effects we have described. In particular, only those few countries designated by the Secretary of State as supporters of terrorism would be directly affected. These limitations, however, do not eliminate the concerns I have described. Moreover, we believe that such an expansion of our jurisdiction could set a harmful precedent. As the Subcommittee is aware, other amendments have also been proposed, and still others could be proposed in the future, that would expand the jurisdiction of our courts in other ways that could significantly affect our foreign relations.

POST-JUDGMENT EXECUTION

The proposed amendment to the execution provisions of Section 1610(a) of the FSIA also presents concerns. Execution on foreign state property has always been an area of particular sensitivity. In enacting the FSIA, Congress made clear that the execution provisions were designed to remedy only in cart the predicament of a plaintiff who has obtained a judgment against a foreign state. Execution against the property of a foreign state (as contrasted with the property of an agency or instrumentality) is narrowly circumscribed by Section 1610, which permits execution against the property of a foreign state only if the property is used for a commercial activity in the United States, and then only in specifically defined circumstances.

Non-commercial torts were recognized by Congress as presenting issues of special concern—and the execution provisions of the FSIA reflect that concern. Section 1610 only permits execution against the assets of state agencies and instrumentalities that lose non-commercial tort cases. State property is generally not available for execution to satisfy non-commercial tort judgments against a foreign state itself.

This bill would open up foreign state assets for execution in cases based upon acts of international terrorism. While the FSIA currently requires a nexus between the

property and the claim in most other instances involving execution against foreign state property, no such nexus would be required here. We believe that this execution provision would raise difficulties.

As I have indicated, the substantive jurisdictional provisions of the bill would expand the reach of our courts beyond generally accepted state practice and could give rise to other undesirable consequences as well. In circumstances such as these, where the underlying assertion of jurisdiction over the action is itself problematic, it is difficult to see how the provision for execution (especially without any nexus requirement) could be acceptable. In short, the potential difficulties created by expanded jurisdiction under Section 1605 would be compounded by expanded—execution under Section 1610, especially since many of these cases would likely involve default judgments. In cases involving deliberate governmental wrongdoing, moreover, domestic measures directed against state property could involve particular sensitivity, given the potential for retaliation and disruption of relations.

PRE-JUDGMENT ATTACHMENT

Finally, we are also concerned about the proposed amendment to the pre-judgment attachment provisions of the FSIA. Having in mind the foreign relations problems to which pre-judgment attachments had sometimes given rise in the era before the FSIA, the drafters of the FSIA carefully circumscribed the availability of such attachments. Under the FSIA, pre-judgment attachments against foreign state property may be obtained only if the purpose of the attachment is to secure satisfaction of a judgment and only if the foreign state has explicitly waived its immunity from such attachment. In effect, such measures are permitted only where the foreign state could be said to have consented to them.

S. 825 would eliminate the need for explicit waiver in cases based upon acts of international terrorism in which the foreign state is not immune from jurisdiction. The provision would appear to require a court to make a determination on immunity as a prerequisite for a pre-judgment attachment in such instances, and we recognize that this limits to some extent the reach of the provision. Nevertheless, we believe the provision still raises difficulties.

As in the case of execution, the problems associated with the underlying assertion of jurisdiction over these actions are compounded by the provision for pre-judgment attachments, since these are designed essentially to enforce the assertion of jurisdiction. As a general matter, moreover, pre-judgment attachments carry potential for disruption in our relations with other states. With this consideration in mind, and given the exposure of U.S. Government property abroad, we have viewed the FSIA's curtailment of such measures as wise. Consistent with this view, in the context of the UN Sixth Committee Working Group we have opposed proposals that would permit pre-judgment attachment without a waiver. S. 825 would represent a loosening of the existing regime under the FSIA that could once again in particular instances lead to irritations in our foreign relations.

RECIPROCITY

Finally, I would like to draw your attention to an issue to which I referred at the outset. Restrictions on immunity have a reciprocal dimension. If the United States extends the jurisdiction of its courts to embrace cases involving alleged wrongdoing by a foreign state outside the United States, we would have to expect that some other states could do likewise. However, there is of course no guarantee that any action taken by other states would precisely mirror our own. If other states were to expand the jurisdiction of their own courts, they might not limit such action to terrorism, for example, but could seek to include as well other kinds of alleged wrongdoing that could be of concern to us. The Department of Justice, which has responsibility for litigation against the United States abroad, may be in a position to provide further comment concerning the reciprocity aspects of this bill.

CONCLUSION

The Department of State fully shares the concern of this Subcommittee with state-sponsored terrorism and its devastating effects on individual Americans. For the reasons described, however, we do not believe it would be wise to enact S. 825.

I appreciate the opportunity to present our views.

Thank you, Mr. Chairman.

Senator HEFLIN. The State Department has, of course, expressed concern that it would be inappropriate for the courts of this country to inquire into whether or not it would be proper for a U.S. citizen

to pursue his claim in the courts of a foreign State. Yet, the Torture Victim Protection Act mandates this inquiry.

What is the basis for permitting this inquiry under the Torture Victim Protection Act but prohibiting it under the Foreign Sovereign Immunities Act?

Ms. BOREK. Well, it is in either case a very difficult inquiry and one which is likely to create a great deal of sensitivity and potential difficulty. From that point of view, it is a difficulty in either case. It would be worse, I guess, under the Torture Victim Protection Act not to have that requirement because that is an established requirement under international law that you first try to use whatever remedies are available in the country itself. It would be difficult to proceed without this. So while I think it causes significant difficulties, to still go ahead and provide the cause of action, yet to leave out this requirement, would be even worse.

Senator HEFLIN. Alliances in the world are constantly shifting. An ally 1 year can become a terrorist the next year. The peacekeeping actions of the United States 1 year could well later be construed as terrorist—Haiti, for example. Keeping in this mind, how could fears of reciprocity through S. 825 influence U.S. foreign policy?

Ms. BOREK. Well, I think you are right to point to this concern. The United States has a very active foreign policy in many ways and is the last remaining super power. It is in some ways more active than that of other countries, and there has always been a great deal of debate over what terrorism is or what other things might be done that would be accused of being in violation of international law.

That is a calculation that would have to be made in a particular case. I think we also would tend to reject the idea that a foreign government can judge in its own courts sovereign actions which we are taking, for example, for national security reasons. That is one of the sort of fundamental problems with the question here. If you are doing something for national security reasons and you believe it is important to your vital interests, do you really think that another country should be able to judge you in its courts as to whether this was legal and insist that you pay for it? Countries have tended to resist that.

Senator HEFLIN. If the United States takes the position that it can enforce its criminal laws against those who act under the color of authority, such as Manuel Noriega in Panama, why should American citizens be unable to pursue civil remedies under similar circumstances?

Ms. BOREK. Well, the criminal laws do apply against individuals and we do have the possibility of civil suits under the Torture Victim Protection Act or under Senator Specter's amendment against individuals. We have not believed in the criminal behavior of States and foreign governments committing criminal behavior, and similarly we would see difficulties with subjecting them to civil suits, so they are parallel in that sense.

Senator HEFLIN. Well, you might have a different situation in Panama with an existing government, but to take Iraq where you have got Saddam Hussein, in the event that he would come under the jurisdiction of U.S. authorities and could be tried, civilians who

might have suffered matters pertaining to which this proposed bill covers would not be allowed to pursue their remedies. Is that somewhat of an inconsistent position?

Ms. BOREK. Well, if you were suing Saddam Hussein as an individual, that would be a different question and that would be covered by existing law.

Senator HEFLIN. But I was speaking about suing the government of Iraq in that instance. In the Panama illustration, you had the situation of whether he was the valid holder of power of the recognized government, but within the scenario that I have put forth that element wouldn't be present. Was that a distinction?

Ms. BOREK. Well, not under this amendment. We don't go into, when you are suing the whole country, what we think about the particular government. There was a case, for example, where the government of the Philippines was sued after the departure of Ferdinand Marcos for actions which had been taken while he was president, allegedly at his direction. It was the new government that was in place when they were sued, but the suit is really against the country and not the individual who happens to be in power.

Senator HEFLIN. Well, as I understand it the United Nations is attempting to develop some type of standards by which this would occur. I was just trying to remember the specific thing. Do you know what I am referring to?

Ms. BOREK. Well, there is the effort to develop the international criminal court which would provide for international prosecutions of individuals in certain cases, and that is ongoing in the United Nations International Law Commission. Of course, the most striking example there is the Yugoslav War Crimes Tribunal which has been recently created.

There is another effort, the Draft Code of Crimes, which is trying to define criminal behavior. We have some difficulties with that, I think, in the substance and the political nature of it.

Senator HEFLIN. Well, I was speaking of the International Law Commission's Draft Articles on Jurisdictional Immunities of States and Their Property, which has been considered by a working group in the United Nations.

Ms. BOREK. Yes.

Senator HEFLIN. How would that come into play relative to this?

Ms. BOREK. Well, that illustrates, I think, where we are in terms of international law. When we first adopted the Foreign Sovereign Immunities Act, the effort was really to codify the view that States could be sued at all in any circumstances, and the area of greatest concern was in commercial dealings, especially with so many governments actively involved in commercial dealings on their own.

Today, although you might think things had progressed quite a lot, that is still a big issue and there are still a number of countries which believe that governments shouldn't be sued at all or that the ability to sue them in commercial matters should be highly restricted. In terms of what we are talking about now, suing for torts generally, that is still far beyond the existing international practice and the views of other countries as to what the law might be.

Senator HEFLIN. The liability in S. 825 is limited by the State Department's list of Nations which sponsor terrorism, such as

Libya and Iran. In the spirit of reciprocity, these Nations have often tried to impose criminal penalties on U.S. officials within their domestic systems. Given that these criminal charges were ignored by the United States, why would civil charges be of concern? There have been some instances in which we have ignored those.

Ms. BOREK. I am not specifically aware of these instances. If you want, I can try to provide a fuller answer on that basis. I would say, in terms of financial liability, two things. One is I think what we are concerned about here is the impact on international law and it might not be one of the terrorist countries that decides that they would like to execute against some of our assets. We are less in a position to ignore that sort of thing throughout the world than many countries might be because we have such a wide presence and so many assets abroad.

Senator HEFLIN. Senator Grassley, do you have an opening statement or any questions you want to ask the witnesses?

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. I have no opening statement. I would explain my absence, if you would allow me to, by saying I was across the hall at a markup of health care reform. I do want to participate in this discussion for a short period of time because I have had an interest in this legislation, as well as some legislation I got passed in other Congresses.

As you know, it was 1992 when Congress enacted the Antiterrorist Act which allows American victims of terrorism to sue groups that commit the terrorism. The case that we had in mind at that time was the one of Leon Klinghoffer murdered by a faction of the PLO. His family is barred from suing by a short statute of limitations, but at least we have got a mechanism set up so if there is another such tragedy there can be a remedy.

Now, this bill that we are dealing with, would have in mind specifically, at least from the past, Pan Am 103 victims, as well as hostages held in Lebanon. It would allow them to sue the country of Libya, Lebanon, or Iran for damages. It seems unfair to allow a remedy for victims of a terrorist group, but not victims of State-sponsored terrorism against the Nation that is committing the terrorism.

So my question to you is how would you distinguish the two that, from your point of view, one approach is all right, but not from the other point of view as far as the relief for a person to sue?

Ms. BOREK. Well, the biggest, I guess, and obvious difference is that you are not affecting foreign sovereign immunity in the case where you sue the individuals. There are two aspects, I guess, to the thing. One is the extraterritoriality of jurisdiction and the other is the impact on foreign sovereign immunities, and it is when you have both present, I think, that we have to say that internationally this is going to be regarded as extreme and not consistent with international law.

In terms of actually recovering, I don't think there is probably very much chance either way, either suing the individuals—obviously, the difficulty is that they don't have money. With the governments, the difficulty is that it is not available, or if you might

recover once they would take steps to make sure that was the last time.

Senator GRASSLEY. But your attention is focused upon the Nation that caused the problem. My attention is focused on the poor victims and some sort of relief that they have. You are right. Maybe as a practical matter, it is very difficult to collect in these instances, but whatever tool it is, it is one more tool that is available.

It would seem to me that if it is very doubtful anybody would collect, then what is the bad aspect of putting such a provision on the books so that we have another tool available to our people?

Secondly, why does the State Department believe that allowing private individuals to sue foreign governments for barbaric acts of terrorism would create a potential national security threat?

Ms. BOREK. Well, national security threat potentially is perhaps a colorful way of putting it, but basically we have negotiations going with many countries on the terrorist list over important issues, such as the Middle East peace process, nonproliferation, and in some cases active hostage-taking and the release of the hostages. The prospect of litigation and threatened or existing judgments is very likely to become an issue in these negotiations, which could complicate it in unpredictable ways. So I mean that is a concern.

Senator GRASSLEY. From the standpoint of the State Department or our Government generally, if a person who has been harmed isn't permitted to sue a foreign government, then how would our Government propose that these victims receive compensation for their injury and their pain and their continuous loss, or should that not be a concern of our Government?

Ms. BOREK. Well, different things have been pursued in different cases. As a minimum sort of benefit, there is, of course, the hostage legislation. In some cases, we have been able actively to pursue and even achieve remedies. In the case of Pan Am 103, for example, we are vigorously pursuing both criminal justice and compensation for the victims against the perpetrators of this terrorist act.

Senator GRASSLEY. I would like to pick up on the reciprocity issue that Senator Heflin discussed with you. As I understand it, the State Department's main concern about this legislation is they fear that foreign States will take reciprocal action, resulting in the U.S. being brought into foreign courts to account for the actions of U.S. law enforcement agencies taken on U.S. soil.

However, since the *Letelier* case decision in 1980, U.S. law enforcement agencies can be held accountable for their activities abroad. It is my understanding that there has not been a flood of such litigation. Therefore, what is the basis for the Department's reciprocity concerns?

Mr. SCHIFFER. I would emphasize that *Letelier,* Senator, is a good example of a case where indeed it took time, but the State Department, working with the new government of Chile, was able to assist in obtaining relief for *Letelier,* and that was an act that occurred in this country. Our concern is really at its height when we talk about imposing responsibility on foreign governments in our courts for acts that occur abroad.

While we certainly would not say that we engage in any of the types of conduct that this act is designed to address, we do have massive presence of law enforcement personnel and others abroad

and we have people who interact in this country with foreign nationals. It is those concerns, not the precise type of conduct, but the fact that the Foreign Sovereign Immunities Act currently conforms to what we think are international norms, and when we start going beyond that, that is when we create exposure for our property.

Senator GRASSLEY. Don't we believe, though, that if a U.S. citizen or even our own officials have engaged in such conduct elsewhere, they should be held accountable as well?

Mr. SCHIFFER. We certainly observe the rule of law, but what we are concerned about is submitting to the jurisdiction of foreign courts to interpret for themselves the validity of actions that we take in our national interest.

Senator GRASSLEY. This bill grants the State Department control over determining which countries can be held liable for their actions. These are Nations that repeatedly receive public condemnation by our country. In fact, these are Nations that have tried to impose criminal penalties upon U.S. officials within their domestic systems. As you know, Libya indicted Reagan and others. In every instance, it was to no avail and of no concern to the United States. Therefore, what realistic concern of reciprocity could S. 825 truly invoke?

Ms. BOREK. Well, I think the potential here is not on a—well, in some cases it could be on a tit-for-tat basis, but the greater potential is to create a precedent which anyone can take advantage of. We have had complaints—they haven't become really serious matters, luckily, to date—about the behavior of law enforcement actions, attempts to sue people for carrying out routine law enforcement actions that we don't think involve any individual responsibility.

People can be, for domestic reasons, quite interested in pursuing some of these cases and we will be providing a clear precedent which they can take advantage of. So with the exposure that the United States has throughout the world, it might not be Libya today because we have relatively few dealings with them, but it could be another country, or even some day it could be Libya.

Senator GRASSLEY. Well, isn't there some inconsistency when our State Department doesn't object to U.S. citizens suing foreign governments for an act of terrorism on U.S. soil, and yet an act of terrorism created by another country against our citizens not on U.S. soil—we object to that?

Ms. BOREK. It is much more common for countries to permit tort suits for things which occur within their own countries, although even though even that is not universal. I mean, important countries such as France don't allow tort suits against foreign governments at all.

Under current law, there have been a few cases allowing actions for murder. It wasn't necessarily styled as terrorism, and that may be desirable because it is a little less inflammatory from the point of view of the government that is sued. But it is clearly much less troublesome in terms of international law and practice to allow suits for activities that occurred within the United States.

Senator GRASSLEY. Thank you, and thank you, Mr. Chairman.

Senator HEFLIN. Senator Specter, do you have an opening statement or some questions?

Senator SPECTER. Mr. Chairman, I thank you. I regret being late for the hearing. We are debating the Whitewater resolution on the floor this morning and the Republican Leader, Senator Dole, asked me especially to be there so, I must return to the floor.

I am the sponsor of the bill and I have some testimony to provide.

Senator HEFLIN. Yes, that is right.

Senator SPECTER. So the question is whether I do it here or there and I think it would be——

Senator HEFLIN. Which would you like to do? Whatever you would prefer, we will accommodate your schedule.

Senator SPECTER. Well, I think I would prefer to do it as a witness, if I might, Mr. Chairman.

Senator HEFLIN. All right. Do you want to ask these witnesses some questions?

Senator SPECTER. No, I do not intend to ask them questions.

Senator HEFLIN. Well, let me, before we leave, ask one question of Mr. Schiffer. Making a hypothetical case, we will say in Iraq a U.S. Government official is subject to being detained and suffers some loss. It doesn't come within the purview of this torture act or immunity, but he receives substantial damages. Then you have, on the other hand, a person who is a nongovernment employee. What is the distinction between remedies that could be recovered by the U.S. Government official as opposed to a U.S. citizen who is not a government employee?

We could use the same situation in regard to some of the hostages and things of that sort. I am making the distinction between a Government employee who is apprehended by a country that is the terrorist Nation list and an American citizen who is not a U.S. Government employee. I am trying to make the distinction between those two.

Mr. SCHIFFER. I am not sure that there is a distinction.

Senator HEFLIN. I would assume that the U.S. Government employee would have certain workers compensation rights and things like that, or else some remedies that would be available to him for monetary damages that he would suffer.

Mr. SCHIFFER. He or she might well have workers compensation rights, but in terms of actions in the courts, I am not sure that there would be a distinction.

Senator HEFLIN. Well, it could well be that there are some other remedies. I am not sure about this. The thought just occurred to me.

Thank you for your testimony. We appreciate it.

Mr. SCHIFFER. Thank you, Mr. Chairman.

Senator HEFLIN. We will now hear from Senator Specter.

STATEMENT OF THE HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you very much, Mr. Chairman. At the outset, I thank you, Senator Heflin, for convening these hearings, which were postponed once because of conflicting schedules.

I believe this is very important legislation because of the basic rights of American citizens to sue foreign governments for absolutely outrageous, barbaric, brutal treatment. I also believe that

the provisions of the existing statute ought to be amended to provide expanded jurisdiction. The reasons for governmental immunity and the concerns over reciprocity are really minimal compared to what is involved in seeking to punish the illegal conduct of foreign governments.

The Foreign Sovereign Immunities Act precludes these suits at the present time. My bill, S. 825, would give the Federal courts jurisdiction over suits for damages for personal injury or death brought against a foreign government if that country has committed, caused or supported an act of terrorism against an American citizen or resident alien. The foreign country could be sued only if the State Department has listed it as a supporter of international terrorism.

Mr. Chairman, as you know, I have introduced legislation in the past on the issue of diplomatic and foreign immunity. I understand the concerns which the State Department has expressed, but the problem of terrorism is an international plague.

In my floor statement when I introduced the bill, I summarized some of the statistics. In the past 10½ years more than 6,500 international terrorist incidents have been reported worldwide, leaving more than 5,100 people dead and 12,500 wounded, and about 2,500 of those attacks were against American targets. As of May 1992, American casualties since 1980 totaled 587 dead and 627 wounded.

I cite with some particularity the incident of Joseph Cicippio, who is with us today. Mr. Cicippio is a neighbor of mine who lives up Ridge Avenue. It is a short ride from East Falls, where I live, in the city of Philadelphia across the county line to Norristown.

Mr. Cicippio was taken hostage on September 12, 1986, while serving as the deputy comptroller of the American University in Beirut. He was kidnapped by a group self-styled the Revolutionary Justice Organization and he was held until December 2, 1991. There are other hostages—Alan Steen, Terry Anderson, David Jacobsen, and many, many others.

Without going into the details of Mr. Cicippio's case, because he is going to be a witness and provide his own testimony, the reports are that the treatment he and the other hostages received was just absolutely barbaric. Hostages were chained and bound, left out to the elements, taunted, threatened with execution, starved, beaten. Any kind of mistreatment that can be conceived of, these hostages have been subjected to it.

The situation is exacerbated by the fact that foreign governments provide support, both political and financial. The Hezbollah, the umbrella organization for many militant Shiite Muslim terrorist groups in Lebanon, including the Revolutionary Justice Organization, collaborates with the political leaders of Iran. It is reported that Iran has spent $30 million during 1985 and more than $64 million in 1987 in Lebanon mainly in the form of donations to Hezbollah and other terrorist organizations.

These foreign governments that support terrorism have assets in the United States, and there is just no reason whatsoever why they shouldn't be subject to suit. There is a category of international crime where there is jurisdiction in a criminal context wherever the offense occurs. As you know, Senator Heflin, Chief Justice Heflin,

Judge Heflin, criminal jurisdiction customarily attaches only where the crime occurs, so that if a crime occurs in Washington, DC, only the District of Columbia has jurisdiction. There are a few exceptions, like piracy, which is an international crime. A pirate may be prosecuted criminally wherever he may be found.

Torture is similarly an exception to the customary law on jurisdiction. Somebody who commits torture may be prosecuted wherever that person may be found and if found in this country can be sued under the Torture Victim Protection Act, which I sponsored, where a foreign government is a co-conspirator, an accessory before the fact or an accessory after the fact, it is just unconscionable that we should not allow our citizens to utilize our courts. They would have to prove their case against the foreign government in order to sustain a judgment and collect on it, but I think our courts ought to be open to hear such claims.

I thought it preferable, in custom with our general rules, Mr. Chairman, to come down here to the witness table. That will not stop me from lobbying you appropriately in the corridors or on the Senate floor, or making arguments when the matter comes before the Judiciary Committee.

I do thank you for conducting the hearing. I know how crowded your schedule is, but I think this is an important matter.

Senator HEFLIN. Well, thank you, Senator Specter. If you want to come back up and question the other witnesses, we would be delighted for you to do so.

Senator SPECTER. Thank you very much.

[The prepared statement of Senator Specter follows:]

PREPARED STATEMENT OF SENATOR ARLEN SPECTER

Mr. Chairman, from 1984 to late in 1991, American citizens were held hostage in Lebanon by terrorist groups sponsored and funded by the Government of Iran. Since their release, many of these former hostages have continued to suffer from the physical and emotional trauma that their periods in captivity thrust upon them. Were a similar situation to occur in this country, the injured party would have access to the judicial system to seek redress in the form of monetary damages in addition to any criminal kidnapping charges. Because the perpetrator behind these acts of terrorism in Lebanon was a foreign government, however, the aggrieved parties cannot seek redress in American courts because of the immunity granted to foreign nations under the Foreign Sovereign Immunities Act. To remedy this travesty for future victims, I am today introducing legislation to amend the Foreign Sovereign Immunities Act.

Since 1980, more than 6500 international terrorist incidents have occurred worldwide, leaving more than 5100 people dead and 12,500 wounded. About 2500 attacks were against American targets. As of May, 1992, American casualties since 1980 have totaled 587 dead and 627 wounded.

Of particular concern and notoriety was the taking of American hostages in Lebanon. On September 12, 1986, Joseph James Cicippio, of Norristown, Pennsylvania, deputy comptroller of the American University of Beirut, was kidnapped by some group self-styled the "Revolutionary Justice Organization." He was held until December 2, 1991, when, in the span of a few remarkable days, the ordeal of the American hostages ended with the release of the last three hostages, Mr. Cicippio, Alann Steen, and Terry Anderson.

"Ended," however, is a relative term, for the ordeal is still not really over for the former hostages. Released hostages reported that they were tortured by their captors. The torture took many forms. Hostages report that they were beaten, starved, chained and bound, exposed to the elements, blindfolded, taunted, subjected to threatened executions, and denied medical and hygiene facilities. Some former captives still suffer from the pain of numerous beatings, especially to their feet. Alann Steen is reported to suffer still from beating-related seizures. Lost time with friends and families cannot be replaced: Terry Anderson's daughter was born and had

turned four before he was released from captivity; Joseph Cicippio's older sister, and his son, Joseph Jr., died while he was held hostage. The pain of their ordeals may never end; the suffering in their hearts may never cease.

What exacerbates any feeling of antipathy is the knowledge that a foreign government provided the support, both politically and financially, for the captors to keep their victims. Hezbollah, the umbrella organization for many militant Shia Moslem terrorist groups in Lebanon, including the "Revolutionary Justice Organization," closely collaborates with the leadership in Iran. The collaboration is reflected in the financial support which it receives from Iran. It is reported that Iran spent $30 million during 1985 and more than $64 million during 1987 in Lebanon, mainly in the form of donations to Hezbollah. Iran's control over the hostage-takers remains unclear, but Government officials have estimated that their control ranged from general to complete. Regardless, Iran's role in the taking and keeping of American hostages underscores the need for this legislation, because under the Foreign Sovereign Immunities Act as it now stands, the former hostages are probably precluded from successfully pursuing legal action against Iran or any other foreign sovereign for sponsoring terrorist activity.

This legislation would amend the Foreign Sovereign Immunities Act by giving Federal courts jurisdiction over any suit brought in this country against any foreign country that has been formally listed by the State Department as a supporter of international terrorism, if that foreign state has committed, caused, or supported an act of terrorism against an American citizen. The legislation would also enable the court to freeze all assets of the defendant country located within the United States sufficient to satisfy a judgment. The bill also provides for a six year statute of limitations.

This legislation is important for several reasons. It would further the United States policy of opposing domestic and international terrorism and would demonstrate to the world that the United States and its people are prepared to act to combat and respond to terrorist acts. It also reinforces our commitment to the rule of law, and in so doing makes clear the contrast between our nation which abides by the principles of international law and outlaw nations such as Iran, which do not.

This legislation would let foreign sovereigns know that states which practice terrorism or actively support it will not do so without consequence. When there is ample evidence that a foreign state supports terrorism so that the State Department has placed that nation on a list of nations that sponsor terrorism, this legislation will allow United States citizens, acting according to lawful process in our courts, to protect their interests and seek compensation for the harm done to them.

State-sponsored terrorism has become a hallmark of certain regimes seeking to influence the political decisions made by the elected representatives of the people in our democracy. None of these nations that actively support state-sponsored terrorism is itself democratic. Countries such as Libya, Iran, Cuba, North Korea, and Iraq will be less likely to support terrorism directed against the citizens of this country when they know that their actions will lead to damages paid to the victims of their terrorism who are United States citizens.

Iran reportedly paid $1 to $2 million for each hostage released to the various fundamentalist groups under its control, after paying for the up keep and confinement of those hostages. This money would be better spent aiding the former hostages assimilate back into their lives and would create a real, measurable cost to Iran for supporting their captivity.

This amendment would also provide additional incentive to other nations to comply with the principles of international law, which condemn terrorism and attacks on innocent citizens of another nation. When a nation's refusal to comply with international law leads to compensation to the victims of its actions, those nations that violate international law will see it as more practical, and beneficial, to change their policies. As demonstrated by the success of combatting terrorism during the height of the Gulf War when the international community agreed to work together to prevent terrorism, much can be accomplished. Supporting this legislation will allow Americans to play a role in enforcing international law by giving them redress against those nations that actively violate international law.

United States counter-terrorism policy is based on three principles: first, the United States makes no concessions to terrorists holding official or private American citizens hostage; second, the United States cooperates with friendly countries in developing practical measures to counter terrorism; and third, the United States works with other countries to put pressure on terrorist-supporting states to persuade them that such support is not free. While these principles serve the policy of the United States government, they do little to address the concerns of individuals who have been the victims of international terrorism. In order to address the individual prob-

lems and results of terrorism, individuals must be able to seek redress for themselves. United States law should aid American citizens in this pursuit, not hinder them. Supporting this legislation would serve the purpose of aiding American citizens, while supporting America's counter-terrorism goals.

I note finally that the purpose of the Foreign Sovereign Immunities Act was to shield foreign nations, as opposed to foreign nationals, from the jurisdiction of American courts for sovereign acts. This is a salutary policy that promotes the pursuit of American foreign policy interests and goals. I have no desire to attack this policy projecting foreign nations from suit. This legislation is very narrowly crafted to create a slight breach in the immunity enjoyed by foreign governments. Only those nations formally recognized by the State Department as active supporters of state-sponsored terrorism could be sued. Thus, this legislation should have no effect on the ability of the President and officers of the Executive to control U.S. foreign policy. While I understand the possible reluctance to open the door to suing foreign nations at all, I believe that the circumstances here are compelling. Terrorism violates all principles of international law. If a nation is formally recognized by the United States Government as a sponsor of terrorism, there can be no valid argument allowing that nation to retain its immunity under American law for the harm committed in pursuit of its terrorist policies.

I ask unanimous consent that a copy of my legislation be printed in the Record at the conclusion of my remarks. I thank the Chair and I yield the Floor.

[Text of S. 825 follows:]

II

103D CONGRESS
1ST SESSION

S. 825

To amend title 28 of the United States Code to permit a foreign state to be subject to the jurisdiction of Federal or State courts in any case involving an act of international terrorism.

IN THE SENATE OF THE UNITED STATES

APRIL 27 (legislative day, APRIL 19), 1993

Mr. SPECTER introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend title 28 of the United States Code to permit a foreign state to be subject to the jurisdiction of Federal or State courts in any case involving an act of international terrorism.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. INAPPLICABILITY OF FOREIGN SOVEREIGN IMMUNITY IN CASES INVOLVING ACTS OF INTERNATIONAL TERRORISM.

(a) DEFINITION.—Section 1603 of title 28, United States Code, is amended by adding at the end the following:

"(f) The term 'act of international terrorism' means an act—

"(1) which is violent or dangerous to human life and that is a violation of the criminal laws of the United States or of any State or that would be a criminal violation if committed within the jurisdiction of the United States or any State; and

"(2) which appears to be intended—

"(A) to intimidate or coerce a civilian population;

"(B) to influence the policy of a government by intimidation or coercion; or

"(C) to affect the conduct of a government by assassination or kidnapping.

"(g) The term 'permanent resident alien' means an alien who has been lawfully admitted to the United States for permanent residence.".

(b) ADDITIONAL EXCEPTION TO FOREIGN STATE IMMUNITY.—Seetion 1605(a) of title 28, United States Code, is amended—

(1) by striking "or" at the end of paragraph (5);

(2) by striking the period at the end of paragraph (6) and inserting "; or"; and

(3) by adding at the end the following new paragraph:

"(7) in which the action is based upon an act of international terrorism—

"(A) within the United States, or

"(B) outside the United States if money damages are sought against a foreign state for personal injury or death to a United States citizen or permanent resident alien,

which act occurred not more than 6 years previously and which was committed or aided or abetted by a foreign state that was designated by the Secretary of State as a state repeatedly providing support for acts of international terrorism under section 40(d) of the Arms Export Control Act.".

(c) PROPERTY SUBJECT TO EXECUTION UPON A JUDGMENT.—Section 1610(a) of title 28, United States Code, is amended—

(1) by striking "or" at the end of paragraph (5);

(2) by striking the period at the end of paragraph (6) and inserting "; or"; and

(3) by adding at the end the following new paragraph:

"(7) the execution relates to a judgment entered in a case based upon an act of international terrorism—

"(A) within the United States, or

"(B) outside the United States if money damages are sought against a foreign state for personal injury or death to a United States citizen or permanent resident alien,

which act occurred not more than 6 years previously and which was committed or aided or abetted by a foreign state that was designated by the Secretary of State as a state repeatedly providing support for acts of international terrorism under section 40(d) of the Arms Export Control Act.".

(d) ATTACHMENT OF PROPERTY PRIOR TO ENTRY OF JUDGMENT.—Section 1610(d) of title 28, United States Code, is amended—

(1) by redesignating paragraph (1) as paragraph (1)(A);

(2) by striking "and" at the end of paragraph (1)(A) and inserting "or"; and

(3) by inserting after paragraph (1)(A) the following:

"(B) the foreign state is not immune from jurisdiction by virtue of the operation of section 1605(7); and".

○

Senator HEFLIN. Our panel is composed of Mr. Abraham Sofaer, who is the former legal adviser for the State Department; Mr. Chad Hall, a former hostage; Mr. Joseph Cicippio, a former hostage; Mr. David P. Jacobsen, a former hostage; and Mr. Hugo Princz, a former hostage.

If you all would come forward to the table, your prepared statements will be admitted into the record, and if you would summarize in 5 minutes, the light will come on, the caution light at 4, and the red light is the ending at 5 minutes.

Mr. Princz, since you are there first, we will start with you and we will go right down the list.

PANEL CONSISTING OF HUGO PRINCZ, FORMER HOSTAGE; HON. FRANK PALLONE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY; DAVID P. JACOBSEN, FORMER HOSTAGE; JOSEPH CICIPPIO, FORMER HOSTAGE; CLINTON A. HALL, FORMER HOSTAGE; AND ABRAHAM D. SOFAER, HUGHES, HUBBARD AND REED

STATEMENT OF HUGO PRINZ

Mr. PRINCZ. Mr. Chairman and members of the subcommittee, thank you for the opportunity to tell my story as an American holocaust survivor denied reparation by the Federal Republic of Germany for 40 years precisely because of my U.S. citizenship.

My experience underscores why the Foreign Sovereign Immunities Act should permit suits by Americans injured abroad by foreign governments. Senator Specter deserves credit for his bill's support of this principle. I also want to thank my Senators, Lautenberg and Bradley, and Senators Lieberman, Kerry of Massachusetts and D'Amato of New York, and my Congressman, Frank Pallone of New Jersey, for their outstanding leadership in my fight for compensation.

Mr. Chairman, my name is Hugo Princz. I am 71 years old and I live in Highland Park, NJ. I was born in what is now the Republic of Slovakia in 1922 to an American businessman. I was a U.S. citizen at birth. In 1942, my family was arrested by the Nazis, who ignored our valid U.S. citizenship papers because we were Jewish Americans. Those papers should have made us part of the Red Cross civilian prisoner exchange then ongoing. Instead, we were deported to the Maidanek camp.

My parents and older sister and her three children were sent to the Treblinka death camp. I never heard from them again. I found out in the summer of 1942 that the whole camp at Treblinka was annihilated. Believe it or not, I was relieved. I was almost happy that they didn't have to suffer anymore. Can you imagine how a mind can work, even mine?

My brothers and I were sent from Maidanek by cattle car to Auschwitz, where we were formally registered as American Jews on our identity cards. We worked as slave laborers. On my first day arriving there, I collected dead bodies, stacking them like lumber for later incineration. Both of my brothers were intentionally starved to death after suffering work-related injuries. Mr. Chairman, I will never forget the sight of my 14-year-old brother in that so-called hospital as long as I live, a living and then dying skeleton.

From Auschwitz, I was sent to the Warsaw Ghetto. This was a couple of months after the uprising. From there, I went on a death march to Camp Dachau. I was enslaved in a Messerschmitt underground airplane factory. In 1945, the Nazis, seeking to erase evidence of war crimes, placed surviving inmates on a death train headed toward the Swiss Alps. It was intercepted by U.S. armed forces and I was liberated. The plan was to annihilate everybody. This evidence was admitted by Eichmann at the trial in Israel.

The Army saw "USA" on my camp jersey and sent me to a U.S. military hospital for treatment. I was in bad shape. While that action saved my life, it later affected my ability to receive reparations from Germany. With my entire family exterminated, I arrived in Pennsylvania in 1946 to try and rebuild my life.

In 1955, the Federal Republic of Germany initiated its compensation program for survivors, to which I made timely application. However, I was refused because I was an American citizen when captured and later rescued and was sent to the U.S. Army hospital. I did not meet the criteria for reparations eligibility.

The Federal Republic of Germany has steadfastly denied me my pension in the intervening 40 years, despite the best efforts of the Congress and the State Department, and even though I believe I am the only known survivor in my situation and seek merely the same reparations as Germany has provided others who were German or European nationals during the Holocaust. Why am I less deserving just because I am an American? Up to this point $74 billion was paid out to survivors. I never received a cent because I was an American citizen.

After exhausting diplomatic remedies, I sued the Federal Republic of Germany in Federal district court in Washington. In December 1992, Judge Sporkin denied Germany's motion to dismiss for lack of jurisdiction under the Foreign Sovereign Immunities Act. Germany's appeal of that decision is now pending in court.

Mr. Chairman, the House and Senate have both passed unanimous resolutions on my behalf and continue to support me in various ways. Such press on CBS, CNN, and the Washington Post have run major pieces on my plight. The American Jewish community has rallied——

Senator HEFLIN. Mr. Princz, we do have a time problem and if you would summarize in about a minute, Congressman Pallone, I understand, has come in and he was going to introduce you. Maybe we will give him a word or two, so if you will summarize in about a minute, please.

Mr. PRINCZ. OK; perhaps most important, the President and Vice President have each personally appealed to the German Chancellor on my behalf, while the Secretaries of State and Treasury have raised my case with their German counterparts. I am gratified by those efforts and that the U.S. calls my claim legitimate and compelling, believes I deserve to be quickly compensated, and will keep the case high on the U.S.-German agenda.

Regrettably, the Chancellor brazenly rebuffed President Clinton's appeal in late January 1994, and Germany has indicated to the U.S. in the courts that it has no interest in resolving my case. I believe they want me to die first. Mr. Chairman, they couldn't kill me before and they are not going to succeed now.

I expect the D.C. court to uphold jurisdiction, but this worry and uncertainty, combined with the lack of diplomatic movement, highlights the need for a legislative fix to permit my case to proceed and thereby provide the State Department leverage to bring Germany to the negotiating table or face a public trial.

The Schumer language from H.R. 934, the comparable House bill, should be added to S. 825 to permit American genocide victims to bring suit under the Foreign Sovereign Immunities Act against the perpetrators of such crimes. Only for this genocide exception is there no statute of limitations. The only criterion is that the victim be a U.S. citizen at the time of injury.

Mr. Chairman, even such a provision became law so that my suit went forward, it would never bring back my family, nor relieve my nightmares of the camps and the physical pain I still suffer. It would never change that. I have spent 40 years fighting for justice, time in which my family has suffered greatly because Germany continues to wage war against me because I am an American citizen.

But this bill, Mr. Chairman, would, if amended, help correct a terrible injustice, an injustice inflicted upon me as an American Jew whose citizenship did not protect him from the Nazis in 1942 when it should have, and which perversely continues to be used by Germany as a shield to shirk its responsibility to me today.

Thank you.

[Hugo Princz submitted the following materials:]

PREPARED STATEMENT OF HUGO PRINZ

SUMMARY

Mr. Hugo Princz appreciates the opportunity to comment on the need for amendments to the Foreign Sovereign Immunities Act. Mr. Princz has engaged in a 40-year effort to obtain reparations from the Federal Republic of Germany for crimes against humanity committed against him while incarcerated in Auschwitz and Dachau as a U.S. national.

The President, Vice-President and Secretary of State of the United States have personally interceded, to no avail, at the highest levels of the German government on behalf of Mr. Princz. Their thwarted efforts demonstrate the necessity for amendments to the Foreign Sovereign Immunities Act ("FSIA ") which would support the Department of State in its efforts to obtain compensation for U.S. nationals extralegally injured by foreign states in the course of state-sponsored genocidal and terrorist activities.

Mr. Princz and his family were American citizens residing in Europe during World War II. In 1942, they were arrested by the Nazis who, ignoring their valid U.S. passports—which should have made them part of an International Red Cross civilian prisoner exchange then underway—on the ground that they were Jewish Americans, instead deported them to concentration camps where all were exterminated except for Mr. Princz. He was liberated in 1945 by U.S. Army personnel which recognized him as an American by the "USA" stenciled on his camp garb by German authorities.

Having come to the U.S. in 1946, Mr. Princz made timely application in 1955 to the reparation program set up by Germany post-war. However, the German government refused him a survivor's pension or other reparations in 1955 and throughout the intervening 40 years solely because, as an American survivor of the camps, he did not—and does not—fit the German criteria for reparations eligibility. Having exhausted diplomatic remedies, he was therefore forced to sue Germany in Federal District Court in Washington in March, 1992.

This testimony is divided into two parts. The first part is a statement from Mr. Princz telling the story of his capture, incarceration and attempts to obtain reparations after the war. The second part is a statement from Mr. Princz' co-counsel, Steven R. Perles, Esq., of Steven R. Perles, P.C. and William R. Marks, Esq., of Powell,

Goldstein, Frazer & Murphy, discussing the legal, diplomatic and historical background of the Princz case and the deficiencies in the FSIA which warrant a "genocide" exception. Also discussed by counsel are suggested technical changes related to the application of the collateral order doctrine and Federal Rule of Civil Procedure 60(b) to Foreign Sovereign Immunities Act litigation which, although unrelated to the problem of jurisdiction, the Subcommittee may wish to consider concurrently with the proposed amendments.

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE: Thank you for giving me the opportunity to tell my story before this Subcommittee and to state why I believe the Foreign Sovereign Immunities Act ("FSIA ") needs to be changed, based upon my experience as an American Holocaust survivor seeking reparations from the Federal Republic of Germany ("FRG ").

As you may know, after the Department of State exhausted all then-available diplomatic remedies, I sued the FRG in Federal District Court here in Washington because of my enslavement by the Nazis in a series of concentration camps during WWII, the murder of my entire American family, and the refusal of the FRG to provide me with reparations as it has others who were German or European nationals during the Holocaust. Some 50,000 survivors who became naturalized U.S. citizens after the War have been receiving the benefits I am seeking.

I also want to commend Senator Specter for his leadership in crafting S. 825 and his support of the principle that American citizens who suffer serious injury abroad at the hands of foreign governments should have recourse, under certain circumstances, in U.S. courts. Finally, I want publicly to thank your colleagues and my two Senators, Senators Lautenberg and Bradley, for their outstanding and longstanding leadership on my behalf, and Senators Lieberman, Kerry of Massachusetts, D'Amato and Dole for their strong and consistent support of my cause. On the House side, my Congressman, Frank Pallone, also deserves special mention for leading my fight for compensation.

Following my prepared statement, I have attached a statement from my co-counsel, Steven Perles of Steven R. Perles, P.C., and William R. Marks of Powell, Goldstein, Frazer & Murphy, who discuss the legal, historical and diplomatic background of my case against Germany, as well as the deficiencies in the FSIA which warrant a "genocide" exception.

Mr. Chairman, my name is Hugo Princz. I am 71 years old, and live in Highland Park, New Jersey. I was born in what is now Slovakia on November 20, 1922, to an American businessman who, as was the style of the time, resided permanently abroad. My father took all of the necessary procedural steps to assure my U.S. citizenship at birth. At the time of the bombing of Pearl Harbor, I was an American teenager resident in German-occupied-Europe and considered a "neutral alien" by the Nazis. My family lived a comfortable life. My father was a successful importer of agricultural equipment, held extensive farm and other real estate holdings and owned a general store.

The bombing of Pearl Harbor changed our residency status in Slovakia from neutral alien to enemy alien. Some ninety days later, we were arrested by the Nazi SS. My father showed our captors our valid U.S. passports and other official papers proving our American citizenship. These papers should have made us immediately eligible for an International Red Cross civilian prisoner exchange then underway. Instead, a Nazi officer tore up our papers, spit on them and said, "You are just Jews. The Americans don't want you back anyway." As a result, we were all deported to the Maidanek Concentration Camp. From there, my parents and sisters were sent to Treblinka, an extermination center. I never heard from them again.

My two younger brothers and I were found fit enough to be slave laborers and were sent by cattle car to Auschwitz, where we were formally "registered" as American Jews. My nationality, "USA", was stenciled across the chest of my prison garb. We were put to work as slave laborers at the Auschwitz-Birkenau synthetic fuels plant. One of my chores, among others, was collecting dead bodies and stacking them like lumber for subsequent incineration. Both brothers—including one who was only 14 years old—were intentionally starved to death in the so-called "hospital" at Auschwitz after suffering work-related injuries. Mr. Chairman, I will never forget the sight of my 14-year-old brother in that hospital as long as I live * * * a living—and then dying—skeleton.

From Auschwitz, I was sent to the Warsaw Ghetto to help "clean" it up after the uprising and salvage from the rubble whatever could be of use for the Nazis. After, I would participate in one of the War's "death marches"—from Warsaw to Dachau.

At Dachau, I was enslaved in a Messerschmitt underground aircraft factory. We had little news of the War, except that the factory was being bombed nightly. One

day I was selected for a work detail on the surface repairing bomb damage; it was still light outside. To my surprise, I heard bombers. I then realized the Germans had run out of ammunition—Allied day-time bombing had begun. I knew the war would soon be over. As the bombers approached, I saw they were American. In an act of euphoria, I started cheering and dancing about as my own countrymen dropped bombs on me.

Near the War's end, the Nazis—seeking to obliterate all evidence of their war crimes—selected me for execution. I was loaded onto cattle cars with others who had been selected and sent toward certain execution near the Swiss Alps. This train, miraculously, was intercepted by U.S. Armed Forces; I will never forget the day, the hour nor the minute of my rescue.

The Army, recognizing me as an American by the "USA" stenciled on my camp garb—the Nazis *throughout* my incarceration knew I was an *American* Jew, for example having identified me as such on my Auschwitz identity card, which is now in Yad Vashem in Israel—sent me to a U.S. military hospital for immediate treatment. While that action probably saved my life, it would later pose a serious problem for my ability to receive reparations from Germany.

My entire family having been exterminated, I arrived in the U.S. in 1946 in order to try and rebuild my life. With the help of relatives in Pennsylvania, I was able to find a footing, and ultimately married my lovely wife, Delores, in Pittsburgh in 1956.

As a matter of historical note, while my Pennsylvania relatives were caring for me, the Czech Communists were busy stealing my father's real estate holdings and other assets that survived the war. The United States Foreign Claims Settlement Commission provided me with prorated compensation for that loss—some $12,000. I have never received anything for my family's loss at the hands of the Germans.

In 1955, the Germans initiated its compensation programs for survivors of the camps, as a condition of the return of its sovereignty. I made timely application for that pension program. However, I was refused because, as an American citizen when captured and later rescued, I was not considered a "stateless" person, was not processed through a Displaced Persons Camp and was not present in Germany on the qualifying date of January 1, 1947, all of which were mandatory German criteria for reparations eligibility. The fact that they could have expected me, after all I had been through, to remain in Germany almost two years after I had been liberated is absolutely astounding; I wanted to leave that country as fast as I possibly could.

The FRG has steadfastly denied me my pension in the intervening 40 years, despite the best efforts of Congress—including, as early as 1984, Senator Bradley—the State Department and others, and even though I believe I am the *only* known survivor in my situation. Germany has thrown up as many procedural roadblocks as it possibly can, and continues to this day to blame *me* for failure to obtain compensation, an assertion totally contradicted by the facts.

After exhausting every conceivable diplomatic avenue, and in consultation with my litigation attorney, Mr. Perles, I decided to sue the FRG in 1992 in Federal District Court here in Washington. I simply felt I had no other alternative. In December, 1992, United States District Court Judge Stanley Sporkin denied Germany's motion to dismiss for lack of jurisdiction under the FSIA. Germany immediately appealed that decision, and I am awaiting the decision of the United States Court of Appeals for the District of Columbia Circuit.

I consider myself fortunate, Mr. Chairman, because my case has caught the attention of Congress and the current Administration in ways I could never have dreamed of just a few months ago. Indeed, thanks in large part to the tireless efforts of Mr. Perles and Mr. Marks, the House and Senate have both passed unanimous resolutions on my behalf and continue to support me through letters and in other ways; the American Jewish community has rallied behind me; and, perhaps most important, the President and Vice President of the United States have each personally appealed to the Chancellor of Germany on my behalf, while the Secretary of State and Secretary of the Treasury have raised my case with their German counterparts. Indeed, the U.S. has taken the position that my claims are "legitimate and compelling", that I deserve to be "quickly compensated", and that the case will remain "high" on the U.S.-German bilateral agenda until it is resolved.

Regrettably, Mr. Chairman, Germany refuses to budge. The Chancellor brazenly rebuffed President Clinton's appeal in late January, 1994, and Germany has basically told the U.S. and the court that it has *no* interest in negotiating a settlement in, or otherwise resolving, my case. Indeed, we believe they are counting on winning their appeal before the court so that the case is dismissed and they can then ignore me completely; either that or they want to drag it out so long that I die. Let me say this emphatically: they couldn't do it before, and they're not going to do it now.

We remain confident that the court will uphold the finding of jurisdiction. Nonetheless, the very uncertainty associated with the process suggests that there should be a *specific* legislative "fix" to this problem, which would not only permit me to bring my case to trial, but would also provide the State Department with the leverage necessary to try and force Germany to come to the negotiating table now so that it avoids a very public trial later. Such a fix would simply take the language from the comparable House version of Senator Specter's bill, *H.R. 934,* to permit American victims of genocide to bring suit, under the FSIA, against the perpetrators of such crimes.

Mr. Chairman, even if such a bill were to pass and be signed into law, it would never bring back my family. It would never relieve my nightmares of Auschwitz, Dachau, the Warsaw Ghetto and what I saw there. And it would never change the fact that I have spent forty years fighting for justice, forty years in which my family has suffered greatly because of Germany's continuing callousness toward me. But it would, Mr. Chairman, help correct a terrible injustice, an injustice inflicted upon me, as an American Jew, whose citizenship did not protect him from the Nazis in 1942 when it should have, and which perversely continues to be used by Germany as a shield to shirk its responsibility to me today.

Thank you.

ADDENDUM

We represent plaintiff-appellee Hugo Princz in an action against the Federal Republic of Germany ("FRG ") currently pending before the United States Court of Appeals for the District of Columbia Circuit. Mr. Princz seeks to recover compensation from the FRG for the injuries inflicted upon him while he was enslaved in the notorious Nazi death camps of Auschwitz and Dachau. This compensation has been repeatedly denied him by the FRG because of his *American* citizenship at the time of his capture by the Nazis and later rescue by the U.S. Army. In addition to the litigation, we have been actively involved in efforts with the Legislative and Executive branches to facilitate a settlement in the case.

The Department of State has characterized Mr. Princz' claim for compensation as "legitimate and compelling". However, in spite of the personal efforts of President Clinton, Vice President Gore and Secretary Christopher, the German government remains stalwart in its refusal to accept financial responsibility for the consequences of that nation's violations of all norms of international law against a U.S. national. Although we are confident that the Court of Appeals will affirm the decision of the U.S. District Court below finding jurisdiction in the case, the inability of the best United States diplomatic efforts to sway the FRG underscores the necessity of amending the Foreign Sovereign Immunities Act ("FSIA ") to provide judicial relief if diplomacy fails. Without it, the Department of State is relegated to the role of the well-intentioned but ineffectual "paper tiger".

Mr. Princz' statement describes in detail the circumstances of his capture and subsequent enslavement by the Nazis, and his liberation by the U.S. Army. We therefore will not go into that here, except to underscore that his ability to survive such horrors helps explain why, forty years after liberation, he continues fiercely to fight for what is rightfully due him as a Holocaust survivor.

Mr. Princz made timely application in 1955 to the reparations program set up by Germany, as a condition of the return of its sovereignty. However, his claim for a survivor's pension was denied because when his U.S. Army liberators recognized him as an American and sent him to a U.S. Army hospital—and ultimately to the United States—instead of to a "Center for Displaced Persons", he no longer met Germany's mandatory criteria for reparations eligibility: he was not considered a "stateless" person, was not processed through a Displaced Persons Camp and was not present in Germany on the qualifying date of January 1, 1947. The FRG has steadfastly denied Mr. Princz his pension in the intervening 40 years, despite the best efforts of Congress, the State Department and others, and even though we believe he is the *only* known survivor in his situation.

Following the exhaustion of diplomatic remedies, Mr. Princz filed suit against the FRG in March 1992. In December 1992, Judge Stanley Sporkin of the U.S. District Court for the District of Columbia denied Germany's motion to dismiss for lack of jurisdiction under the FSIA. Germany immediately appealed that decision, pursuant to the collateral order doctrine; a decision from the Court of Appeals for the D.C. Circuit is currently pending. In Diplomatic Notes and Executive Branch correspondence introduced into the record of the judicial proceedings, the Department of State has repeatedly described Mr. Princz' claims as "legitimate and compelling," and

stated that he deserves to be "quickly compensated" and that the case will remain "high" on the U.S.-German bilateral agenda until it is resolved.

Germany's failure to accept financial responsibility towards Mr. Princz simply because of his *American* citizenship at the time of his capture and later rescue, when it has distributed billions in compensation to other Nazi death camp survivors, led to the introduction of *S. Res. 162,* a resolution relating to Mr. Princz, in early November 1993, by Senator Lautenberg and Senators Bradley, D'Amato, Lieberman and John Kerry, later joined by Senator Dole. *H. Res. 323,* a companion resolution, was introduced in the House on November 21st by Rep. Frank Pallone (D–NJ) and a number of co-sponsors.

S. Res. 162 passed the Senate by unanimous consent on November 21, 1993. *H. Res. 323* passed the full House unanimously on January 26, 1994. Both resolutions called upon President Clinton and Secretary of State Christopher to raise the Princz case with the Chancellor and Foreign Minister of Germany, respectively, and to take all appropriate steps necessary to ensure that fair reparations are expeditiously provided Mr. Princz. The same message was communicated by the American Jewish community on December 27, 1993, when a letter signed by the presidents of a dozen major Jewish organizations urged President Clinton to discuss the Princz matter with Chancellor Kohl at the January 1994 NATO Summit. A number of bipartisan, bicameral Congressional letters, initiated by Senators Lautenberg, Bradley and Lieberman and Congressman Pallone, and signed by numerous other Senate and House members, have since gone out to the President and Secretary of State urging forceful Administration action on behalf of Mr. Princz. Several of these letters are attached for the Subcommittee's review.

In response to these entreaties, the Clinton Administration renewed attempts to achieve a diplomatic resolution of this matter, including conducting face-to-face discussions between President Clinton and Chancellor Kohl. The D.C. Circuit entered an order effectively issuing an administrative stay of proceedings during the Clinton-Kohl discussions and the broader U.S.-German diplomatic dialogue and ordered the parties to report on the outcome of that activity. Chancellor Kohl rebuffed the President's request at their luncheon held here in Washington on January 31, 1994. Germany affirmed its decision to rebuff President Clinton by sending its Diplomatic Note of February 2, 1994 to the State Department, indicating that it had no intention of negotiating a settlement in, or otherwise resolving, the Princz case. Both we and the Germans independently reported to the Court the failure of these diplomatic discussions. As of this date, the German Government persists in its refusal to be held accountable for the injuries it *admittedly* inflicted on Mr. Princz.

The Administration and especially the Department of State deserve the highest praise for their repeated and forceful advocacy of Mr. Princz' claim. Unfortunately, this diplomacy has not yielded the desired results and, in light of continued German intransigence, seems unlikely to succeed. This reality therefore underscores the necessity for clarifying amendments to the FSIA to permit suit against foreign governments which have committed crimes against humanity against United States citizens, yet refuse to negotiate reparations in good faith with the Department of State or, in this case, the President of the United States.

Under international law, individuals have a right not to be deliberately and wantonly injured by a foreign state's commission of a crime against humanity, even while within that state's territory. This is recognized as *jus cogens*—a peremptory norm of international law. The United States Constitution specifically incorporates such rules into the law of the land. Since U.S. law recognizes this right, remedy in the form of a civil cause of action against the offending state should also be readily available to similarly-injured American citizens.

The current language of the FSIA, as it has been interpreted by the federal courts, leaves the proper avenue for relief unsettled. As Judge Edwards has written, the Foreign Sovereign Immunities Act is "an area of the law that cries out for clarification by the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the 'law of nations'". *Tel-Oren* v. *Libyan Arab Republic,* 726 F.2d 774, 775 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985). A decision of the Second Circuit Court of Appeals further unsettled the issues and underscores deficiencies in the FSIA's current language. Even egregious actions such as Iran's taking of diplomatic hostages has been found insufficient for the invocation of jurisdiction. *See Persinger* v. *Islamic Republic of Iran,* 729 F.2d 835, 843 (2nd Cir.), cert. denied 469 U.S. 881(1984) ("The heinousness of Iran's actions, however, is not sufficient to give this court jurisdiction to hear the plaintiffs' claims. ").

In the Princz matter, for example, the only issue in contention is whether Germany enjoys immunity from suit in tort before U.S. Courts for its outlaw acts during the Nazi regime. Given that Germany does not deny the factual allegations of Mr. Princz' complaint, the sole impediment to Mr. Princz receiving federal court-ordered

reparations is Germany's belief that it enjoys absolute immunity from suit in the United States, even for *jus cogens* violations committed against a United States national. Thus, the question which ultimately remains after *Persinger, Tel-Oren* and now *Princz* is whether the U.S. will continue to allow outlaw nations—or in Germany's case, a former outlaw nation—to rebuff the efforts of the Executive Branch to negotiate reasonable compensation for American victims of *jus cogens* violations, secure in the knowledge that their obstreperous conduct is of inconsequential legal effect in the United States.

Public policy would be well-served by the amendments to the FSIA proposed in *S. 825.* First, it would clarify an area of the law which, at best, could be presently described as muddled and uncertain.

Second, the effect of clarifying the law and affirming federal jurisdiction over Princz-type actions would be to give real "teeth" to the State Department in restitution negotiations. If the Department of State had the ability to certify a restitution claim for judicial review, it would significantly enhance its negotiating leverage with the foreign sovereign. Currently, the State Department has little leverage; for all its efforts, it still has not been able to get Germany to approach the bargaining table. German officials have rebuffed the efforts of all those working on Hugo Princz' behalf, including President Clinton, Vice President Gore, Secretary of State Christopher, and many members of Congress, aware that their refusals to negotiate will not have adverse legal consequences for them in the United States.

Third, these amendments would also reinforce the United States' strong stand against terrorism. By assuring the remedy of a civil cause of action against any foreign state engaged in such outlaw activities, they might cause the foreign state to give pause prior to embarking on a course of egregious conduct. At a minimum, the amendments would serve as a tool of deterrence in the State Department's diplomatic arsenal.

To strengthen these salutary effects, we would suggest that the Subcommittee consider revising these amendments to assure a remedy for Americans injured during foreign state-sponsored genocidal activities, as was Mr. Princz. Germany's conduct during WWII was a far more outrageous violation of the norms of international law than are today's terrorist acts. Such changes might parallel the amendments sponsored by Representative Schumer of New York in *H.R. 934,* which have been adopted by the House Judiciary International Law Subcommittee, chaired by Congressman Mazzoli.

We would also draw to your attention two procedural developments which impose significant obstacles, in the form of delays, increased costs, and uncertainty, to all plaintiffs in litigation involving the FSIA, including commercial claims. Although not directly related to the problems of jurisdiction, these developments may be relevant to the Subcommittee as it considers amending the Act.

First, the D.C. Circuit in the Princz matter, consistent with other Circuit Courts of Appeals, ruled that under the collateral order doctrine, a foreign sovereign may, as a matter of right and without regard to the merits, appeal an adverse foreign sovereign immunity determination prior to trial (at the time normally reserved for interlocutory appeals). The effect is to delay every FSIA trial on the merits pending lengthy and expensive appeals on the issue of jurisdiction. This is facially inconsistent with the intended purpose of the FSIA—to put foreign government litigants on an equal footing with private party litigants. If Congress were to amend the Act to prohibit collateral order doctrine appeals, foreign governments, like private party litigants, could still appeal the denial of their motion to dismiss on an interlocutory basis, with the certification of the trial judge. If the trial judge refuses to certify, relief may be obtained at the appellate level under the All Writs Act, whereunder, upon a showing of error, the appellate court may grant a writ compelling the trial judge to certify the issue. Mexico, for example, has obtained such relief in the Ninth Circuit. *See, Compania Mexicana de Aviacion. S.A.* v. *United States District Court for the Central District of California,* 859 F.2d 1354 (9th Cir. 1988).

To put this problem in perspective, before the Circuit Court of Appeals began to apply the collateral order doctrine to foreign sovereign immunity determinations, the question of immunity ordinarily could be appealed only after trial. For example, Germany, in a case arising out of a tree falling from its Embassy's property onto a public right-of-way and killing a passerby, lost the initial foreign sovereign immunity determination in the district court, was denied the opportunity for interlocutory appeal because the questions presented were not novel nor concerned unsettled questions of law, and promptly thereafter settled the case.

In the Princz matter, however, Germany lost the initial immunity determination, took an appeal of that adverse decision as of right under the collateral order doctrine, and in spite of the entreaties of the State Department and the President of the United States, still refuses even to begin negotiating in good faith to settle this

claim. There is a clear correlation between the German change in attitude towards settlement negotiations and the D.C. Circuit's change in philosophy, in the intervening years, regarding the application of the collateral order doctrine to immunity determinations.

Although not an issue in Princz, the Subcommittee should also be aware that in cases where a foreign state chooses not to appear and assert the defense of foreign sovereign immunity, Federal Rule of Civil Procedure 60(b) (4) and (6) have been interpreted to provide a vehicle to set aside a default judgment in FSIA cases. The normal time limitation of one year for a Rule 60 motion does not apply to subparagraphs 4 and 6. Thus, Rule 60 has been interpreted to provide relief for foreign states which initially declined to appear at any time after the default judgment had been entered against it, thereby rendering supposedly "final" judgments subject to relitigation on the issue of immunity at the whim of the foreign state.

The availability of both the collateral order doctrine and Rule 60(b) relief from judgments to foreign state defendants entrenches perverse incentives to use the issue of immunity as a dilatory tactic. These procedural advantages place opposing private party litigants at a severe disadvantage—uncertainty, delay, and significant expense. In the Princz matter, for example, even though the case is being heard on expedited consideration, we have been litigating in excess of two years, have won the sovereign immunity determination at the trial level, had a trial scheduled, had the time when most disputes settle (between the time of the ruling on dispositive motions and the trial date) eclipsed, and now face the prospect of protracted appellate and possibly Supreme Court review. Private party litigation would have already gone to trial. As a result of these procedural advantages, Germany has no interest in settling this matter.

In a situation such as Mr. Princz', as with cases involving state-sponsored terrorist attacks against U.S. nationals, a foreign state has committed an extralegal act against a United States national. There is no logical reason why the United States should be concerned with the possibility of offending that sovereign when causing it to be subject to the jurisdiction of the federal courts to answer for such heinous conduct. The comity between nations giving rise to foreign sovereign immunity contemplated by Justice Marshall in the *Schooner Exchange* v. *M'Faddon & Others,* 11 U.S. (7 Cranch) 116 (1812), would already have been breached.

The extralegal act committed against Mr. Princz constitutes a fundamental breach of international comity. Germany's subsequent refusal to cooperate with the State Department to resolve the matter amicably only exacerbates the breach. If the personal suasion of the President, Vice President, and Secretary of State have no impact on a reformed outlaw state such as the FRG, how could diplomacy be expected to have any effect on those states which actively support terrorist activities? Mr. Princz' unfortunate case history serves as a chilling example of the need for legislative action.

United States Department of State

Washington, D.C. 20520

APR 20 1994

Dear Senator Lautenberg:

The Secretary has asked me to reply to your letter of April 6, 1994, urging that the State Department consider filing a statement of interest in support of Mr. Hugo Princz in the case of Princz v. The Federal Republic of Germany. The Department appreciates the concerns reflected in your letter and shares your desire to find a way to obtain for Mr. Princz just compensation for his claim.

Since the enactment of the Foreign Sovereign Immunities Act in 1976, determinations of immunity of foreign states are made by the courts, and not the Department of State. While the United States sometimes files amicus briefs expressing its views as to the interpretation of the FSIA, such cases are relatively infrequent. We have carefully reviewed the issues involved in this case and have discussed the case on various occasions with counsel for both parties. We have also consulted closely with the Department of Justice. Having considered the matter, however, we do not plan to participate in the appeal presently pending before the U.S. Court of Appeals for the District of Columbia. Our attorneys in the Office of the Legal Adviser have discussed with your staff the issues presented in the court case.

Nevertheless, I wish to assure you that notwithstanding our decision not to file a statement of interest in this case, we continue to vigorously pursue other avenues to assist Mr. Princz. Specifically, we are still pressing at the highest levels of the German government our view that Mr. Princz should be quickly compensated through a substantial ex-gratia payment. In this regard, on April 5, Ambassador Holbrooke urged in a meeting with MFA State Secretary Kastrup that Germany seek to fashion a settlement with Mr. Princz' counsel. The Secretary will advocate Mr. Princz' legitimate and compelling claim in a meeting with Foreign Minister Kinkel April 21. In addition, should the Deputy Secretary see German Finance Minister Waigel during the latter's attendance at the IBRD/IMF talks in Washington, we again plan to raise the Princz matter.

The Honorable
Frank R. Lautenberg,
United States Senate.

We are also recommending that American parliamentarians attending the North Atlantic Assembly gathering in May express their support for a just resolution of Mr. Prince' claim to their German counterparts. The Prince case will remain high on our diplomatic agenda with Germany until such time there is a satisfactory settlement.

We hope this information has been useful to you. Please do not hesitate to contact us if we can be of further assistance.

Sincerely,

Wendy R. Sherman
Assistant Secretary
Legislative Affairs

FRANK R. LAUTENBERG
NEW JERSEY

United States Senate

WASHINGTON, DC 20510-3002

COMMITTEES
APPROPRIATIONS
BUDGET
ENVIRONMENT AND PUBLIC WORKS
SMALL BUSINESS
HELSINKI COMMISSION

April 4, 1994

The Honorable Warren Christopher
Secretary of State
Department of State
Washington, D.C. 20520

Dear Secretary Christopher:

We are writing to urge the State Department to consider filing a "statement of interest" in support of Mr. Hugo Princz in the case of Princz v. The Federal Republic of Germany, which is pending before the United States Court of Appeals for the District of Columbia Circuit. If you conclude that this action is appropriate, we believe it would complement the United States Government's significant diplomatic efforts on this case and help ensure that Hugo Princz's claim will be fairly resolved.

As you know, Hugo Princz is an American citizen who has been unable to obtain fair reparations from the Government of Germany in compensation for his time in Nazi death camps. In 1992, Mr. Princz filed suit against the German Government in the United States District Court for the District of Columbia. The District Court subsequently denied Germany's motion to dismiss the suit for reason of foreign sovereign immunity and set the case for trial. Germany appealed to the United States Court of Appeals for the District of Columbia Circuit, where the matter is now pending.

Meanwhile, with our support, you and others in the Administration have actively pursued diplomatic opportunities to resolve this matter. As you know, President Clinton raised the matter with Chancellor Kohl during their luncheon meeting here on January 31. We commend you for your efforts and commend the President for taking up Hugo Princz's case directly with the Chancellor. We know from Assistant Secretary Sherman's response to our February 16 letter to you that you share our profound disappointment over the Chancellor's rebuff of the President on this issue.

Like the Administration, we are frustrated that the German Government has not been more forthcoming. Both the Senate and the House of Representatives have unanimously passed resolutions calling on the President to intercede on Mr. Princz's behalf with the German Chancellor and on the German government to provide fair reparations. In the wake of the President's unsuccessful intercession with the Chancellor, Assistant Secretary Sherman's letter assures us that this case remains on the diplomatic agenda and that "Mr. Princz's legitimate and compelling claims should be

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speedily resolved." Unfortunately, the German Government is not responding to our country's diplomatic efforts.

We believe the Administration should, despite the German Government's apparent unwillingness to right this wrong, continue its efforts on Mr. Princz's behalf. In this regard, we hope the State Department will look carefully at the possibility of urging the Justice Department to file a "statement of interest" in the case and, if the facts warrent, file such a statement. We hope the Justice Department will agree, and we have written Attorney General Reno in this regard.

Please let us know how you decide to proceed. We appreciate your attention to this matter.

Sincerely,

Frank Pallone, Jr.

Frank R. Lautenberg

Robert G. Torricelli

Bill Bradley

Howard L. Berman

Joseph I. Lieberman

Charles E. Schumer

John F. Kerry

Steny H. Hoyer

Alfonse M. D'Amato

Marjorie Margolies-Mezvinsky

Paul Simon

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Robert Menendez

Major R. Owens

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Herb Klein

Charles S. Robb

James M. Jeffords

Ron Wyden

Eliot L. Engel

Michael R. McNulty

Robert E. Andrews

THE WHITE HOUSE

WASHINGTON

March 30, 1994

JFL

Dear Senator Lieberman:

Thank you for your letter concerning Mr. Hugo Princz and his claim for compensation from Germany for the suffering he endured in Nazi death camps.

We believe Mr. Princz deserves compensation and have repeatedly urged Bonn to make a significant ex gratia payment to resolve the case. As you know, the President personally raised the issue with Chancellor Kohl in January. We are disappointed that the German Government has yet to settle Mr. Princz's reparation claim despite these official and other representations on his behalf.

I can assure you that Mr. Princz's case is an important issue on our bilateral agenda with Germany and that we will continue to press the view that his legitimate and compelling claims should speedily be resolved.

Sincerely,

Sandy

Samuel R. Berger
Deputy Assistant to the President
for National Security

The Honorable Joseph I. Lieberman
United States Senate
Washington, D.C. 20510

United States Department of State

Washington, D.C. 20520

Dear Senator Lieberman:

Thank you for your letter of February 16 regarding the claim by American citizen Hugo Princz for compensation from Germany for his suffering in Nazi concentration camps.

The State Department's firm position is that Mr. Princz should be compensated for the persecution he suffered at the hands of the Nazis. We have repeatedly recommended that Bonn make a significant ex gratia payment to resolve this case, and have offered our good offices to promote resolution.

We are very disappointed that the German Government has yet to settle Mr. Princz' reparation claim despite repeated high-level diplomatic representations, including one by President Clinton January 31, urging them to do so.

This tragic case remains on our diplomatic agenda with Germany. We will continue to press the view that Mr. Princz' legitimate and compelling claims should be speedily resolved.

We hope this information is helpful to you. If you need further assistance in this or any other matter, please let us know.

Sincerely,

Wendy R. Sherman

Wendy R. Sherman
Assistant Secretary
Legislative Affairs

The Honorable,
Joseph Lieberman,
United States Senate.

FRANK R. LAUTENBERG
NEW JERSEY

APPROPRIATIONS
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SELECT COMMITTEE ON INTELLIGENCE

United States Senate

WASHINGTON, DC 20510-3002

February 16, 1994

The Honorable Warren Christopher
Secretary of State
The State Department
Washington, D.C. 20520

Dear Secretary Christopher:

We are writing to you about the case of Mr. Hugo Princz, an American citizen who has been unable to obtain fair reparations from the Government of Germany in compensation for his time in Nazi death camps. This case has long been the subject of high-level discussion between the governments of the United States and Germany, most recently between President Clinton and Chancellor Kohl during their luncheon meeting here. We know that you and Ambassador Holbrooke have also been deeply involved in this.

First, we want to express our appreciation to the President for raising this issue with the Chancellor. We know how crowded the agenda was for that short meeting, and we deeply appreciate the President's responsiveness to our request. We also know how very much it meant to Mr. Princz.

Unfortunately, Chancellor Kohl did not respond to President Clinton's request for a more reasonable German response to Mr. Princz's plight. Nor did he respond to our direct plea for fair reparations. By handing the President a "Note Verbale" simply reiterating the German Government's rigid refusal to pay Mr. Princz fair reparations, we believe Germany insulted both the President and the United States. Certainly, it was an additional insult to Hugo Princz.

Hugo Princz's case deserves a better response. To that end, we would like to know how the United States Government intends to respond to Germany's lack of meaningful response to President Clinton's request concerning Mr. Princz.

Hugo Princz and his family lived in Europe at the outbreak of World War II. Although United States citizens and civilians at the time, Mr. Princz and his family were arrested as enemy aliens of the German Government in early 1942. Despite the protests of Mr. Princz's father, the government of Germany refused to honor the validity of the Princz family's United States passports.

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The Princz family were Jewish Americans. Consequently, the Government of Germany would not return them to the United States although a civilian prisoner exchange program was available through the International Red Cross. Instead, the Princz family was sent to the Maidanek concentration camp in Poland. Mr. Princz's father, mother and sister were shipped to Treblinka death camp and exterminated.

Mr. Princz and his two younger brothers were transported by cattle car to Auschwitz to serve as slave laborers. At Auschwitz, Mr. Princz was forced to watch as his two brothers were starved to death while they lay injured in a camp hospital. Mr. Princz was subsequently transferred to a camp in Warsaw and then, by death march, to the Dachau slave labor facility.

In the closing days of the war, Mr. Princz and other slave laborers were selected for extermination by Germany in an effort to destroy incriminating evidence of war crimes. Fortunately, hours before Mr. Princz's scheduled execution, his death train was intercepted and liberated by United States armed forces personnel.

U.S. personnel recognized Mr. Princz as an American by the designation "USA" stenciled by the Germans on his concentration camp garb, and he was sent to an American military hospital for immediate treatment.

Because Mr. Princz was given immediate medical treatment, he was never processed through a "Center for Displaced Persons." This process would later affect his eligibility to receive reparations for his suffering.

Following his hospitalization, Mr. Princz was permitted to enter then-Communist-occupied Czechoslovakia to search for family members. After determining that he was the sole survivor, Mr. Princz traveled to America.

In the early 1950's, the Federal Republic of Germany established a reparations program for "survivors." Mr. Princz's application was rejected because had not been classified as a "stateless" person or "refugee."

Had he been processed through the "Center For Displaced Persons" instead of receiving immediate medical care in a U.S. facility, Mr. Princz would have received this designation. Instead, he has been considered a United States national and, therefore, ineligible for fair reparations.

Although the Federal Republic of Germany has provided reparations to thousands of holocaust survivors, Mr. Princz hasn't received a dime.

We believe the Federal Republic of Germany should recognize the injustice against Mr. Princz and pay him fair reparations. Mr. Princz has suffered enough.

Last year, the Senate approved a resolution calling on the German government to provide fair reparations to Mr. Hugo Princz. A similar resolution passed the House of Representatives in late January of this year.

The Federal Republic of Germany cannot bring back Hugo Princz's family or erase the painful memories of the tragic years he spent in slave labor camps of the previous German government. But, the Federal Republic of Germany can and should acknowledge Mr. Princz's tragic story and provide him with fair reparations which are long overdue.

Please let us know what options the Administration intends to pursue to move this case along in light of Chancellor Kohl's refusal to provide fair reparations. Thank you for your attention to this matter.

Sincerely,

Frank Pallone, Jr.

Frank R. Lautenberg

Robert G. Torricelli

Bill Bradley

Lynn Schenk

Joseph I. Lieberman

Howard L. Berman

John F. Kerry

Charles E. Schumer

Alfonse M. D'Amato

Steny H. Hoyer

Paul Simon

Marjorie Margolies-Mezvinsky

Max Baucus

Tom Lantos

Ronald V. Dellums

Benjamin A. Gilman

Henry A. Waxman

Daniel Patrick Moynihan

Robert Menendez

THE WHITE HOUSE

WASHINGTON

January 28, 1994

Dear Joe:

Thank you for your letter regarding the case of Hugo Princz.

I am aware of Mr. Princz's case and the interest it has generated among those who seek its satisfactory resolution; I understand that a legal decision is pending. As you may know, this Administration has had several discussions with the government of Germany regarding the case of Mr. Princz. Most recently, Vice President Gore raised this issue with Chancellor Kohl during their December conversations in Germany.

Thank you for bringing your interest in Mr. Princz's situation to my attention.

Sincerely,

Bill Clinton

The Honorable Joseph I. Lieberman
United States Senate
Washington, DC 20510

December 27, 1993

The Honorable Bill Clinton
President of the United States
The White House
Washington, D.C. 20500

Dear Mr. President:

In advance of the NATO Summit in Brussels in mid-January, and your meeting there with Chancellor Helmut Kohl, we wanted to bring to your attention the case of American Holocaust survivor Hugo Princz and to ask that you raise this matter -- of deep concern to the American Jewish community -- with Chancellor Kohl directly.

Mr. Princz and his family were U.S. citizens residing in Europe during World War II. In 1942, they were arrested by the Nazis who, ignoring their valid U.S. passports on the grounds that they were Jewish Americans, instead deported them to concentration camps where Mr. Princz's entire family was murdered. Mr. Princz survived, but only after interrment as a slave laborer at Auschwitz and Dachau. He was ultimately liberated in 1945 by U.S. Armed Forces while on a train heading toward certain execution. The Army sent him to a U.S. military hospital for treatment because it recognized him as an American by the "USA" stenciled by the Germans on his camp garb. While that action probably saved Mr. Princz' life, it had troubling consequences for his later ability to receive reparations.

Mr. Princz, having come to the U.S. in 1946, made timely application in 1955 to the reparations program set up by Germany post-war. However, his claim was denied, as was his participation in a pension program for survivors, solely because -- as a U.S. national when captured and later rescued who did not go through a DP Camp -- he did not "fit" the German criteria for eligibility.

The German Government has steadfastly denied Mr. Princz his pension in the intervening 40 years, despite the best efforts of Congress, the State Department and others, and even though he is the only known survivor in his situation. He was therefore forced to sue Germany in March, 1992, in Federal Court in Washington. Germany's motion to dismiss the suit was denied by the District Court, and its appeal of that decision was recently heard by the D.C. Circuit.

Mr. President, Germany's failure to accept financial responsibility to Mr. Princz simply because of his American citizenship at the time of his capture and later rescue -- when it has distributed billions in compensation to other Nazi death camp survivors and is also providing pensions to former members of the Latvian SS -- is a serious injustice. Indeed, it prompted introduction of S. Res. 162 in early November by Senator Lautenberg and Senators Bradley, D'Amato, Lieberman, and Kerry, later joined by Senator Dole.

This resolution passed the Senate by unanimous consent on November 20, 1993. It calls upon you and Secretary of State Christopher to raise the Princz case with the Chancellor and Foreign Minister of Germany, respectively, and to take all appropriate steps necessary to ensure that fair reparations are expeditiously provided Mr. Princz. H. Res. 323, a companion resolution, was introduced in the House on November 21. Congressman Steny Hoyer did raise the Princz matter with Secretary Christopher at a November 24 breakfast just prior to the Secretary's departure for Europe, and we understand that it was raised with German officials by a member of the Secretary's party.

We believe that your personal intervention and that of Secretary Christopher -- in conjunction with Congress -- is essential to produce some tangible measure of relief for Mr. Princz's suffering, especially in light of Germany's continuing obduracy on this subject.

In sum, we urge you to seize the opportunity presented by the forthcoming NATO summit personally to press Chancellor Kohl on the Princz matter, and to right a terrible wrong inflicted upon an American Jew whose citizenship did not protect him from the Nazis in 1942, and which perversely continues to be used by Germany as a shield to shirk its responsibility to him today.

Sincerely,

Rabbi Morris Sherer
President
Agudath Israel of America

Alfred H. Moses
President
American Jewish Committee

Robert K. Lifton
President
American Jewish Congress

Melvin Salberg
National Chairman
Anti-Defamation League

Deborah Kaplan
National President
Hadassah

Nathan Lewin
President
International Association of Jewish Lawyers and Jurists

Lester Pollack
President
Jewish Community Centers Association

Edward D. Blatt
National Commander
Jewish War Veterans of the USA

Sylvia Lewis
President
NA'AMAT USA

Susan Katz
National President
National Coucil of Jewish Women

Maynard I. Wishner
Chairman
National Jewish Community Relations Advisory Council

Alexander M. Schindler
President
Union of American Hebrew Congregations

Senator HEFLIN. Congressman Pallone, you were going to introduce him, but we are well ahead.

Mr. PALLONE. Do you want me to just speak?

Senator HEFLIN. Yes, sir, if you would, just briefly.

STATEMENT OF HON. FRANK PALLONE, A U.S. REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Representative PALLONE. Mr. Chairman, when I was here earlier I was somewhat concerned, and now I am even more concerned about the fact that Mr. Princz' case really involves a situation of genocide, as you heard him speak about his being a victim of the Holocaust. He mentioned the House equivalent of the bill that is before the subcommittee today and an amendment that was introduced by Mr. Schumer that would basically include his case for victims of genocide.

My concern is that—and, again, I don't know too much about all of the individuals here, but my concern is that the way the legislation is framed now in the Senate version, it would take care of victims of terrorism, but not necessarily victims of genocide in the Holocaust situation like Mr. Princz. So I wanted to point that out to the subcommittee. It may be necessary to change the language to make sure that his case and those like him who are victims of genocide are included. I am concerned that the language, the way it is now, is not exactly the same as the House bill in that respect, if that could be looked into, with your permission.

Senator HEFLIN. Well, we appreciate your testimony. Senator Specter is the author of the bill and he will be the one moving it. If you want to speak with him, you can do that.

Representative PALLONE. OK, I will do that. You should know, and I will just say this for my last comment, that we really have had a lot of people from within the administration—even the President has brought this up to the attention of the Chancellor of Germany, and the Secretary of State and also Mr. Bentsen have all tried through diplomatic channels to try to deal with the situation and have so far been rebuffed by the German government. So it is really crucial that we put something in the legislation to take care of his exception because we have really tried every other diplomatic or negotiated means to try to deal with Mr. Princz' case, which is why we are really before the subcommittee today asking that they do some legislation similar to the House version so that he can have his day in court.

Senator HEFLIN. Thank you, sir.

Representative PALLONE. Thank you.

Senator HEFLIN. Mr. Jacobsen, will you go ahead with your testimony, please?

STATEMENT OF DAVID P. JACOBSEN

Mr. JACOBSEN. Yes, Mr. Chairman. Thank you so very much for allowing me to speak to this group today. Perhaps it is the most important 5 minutes of my 62 years of life here on this earth.

I was the American chief executive officer of the American University of Beirut in Lebanon. I was kidnaped on May 28, 1985, and held for 17 months and released on November 2, 1986. I am here

today asking and pleading for justice and closure for all victims and the families of victims of international terrorism.

I am here asking on behalf of Bill Buckley, with whom I was held hostage, both of us blindfolded, stripped to our underwear, chained to the floor. I listened to Bill Buckley die, his last words saying, I think I will have my hot cakes now with blueberry syrup. Bill deserves justice.

My friend, David Collett—the last image he had of his father, Alec, was on a videotape with his dad swinging slowly on the end of a rope. David and Alec and his sister deserve justice. William Higgins deserves justice, and that gentle librarian from AUB who died with a bullet in his forehead—he and his family deserve justice. So I am here today asking that justice and closure be permitted for all the victims of international terrorism.

Rodney King was guaranteed his legal civil rights when harmed by agents of our Government, but every American citizen and family member victimized by international terrorists or Nations that sponsor terrorism have been denied the right to seek justice by our own very Government. That is a violation of our basic civil rights and the intent of the U.S. Constitution.

In January of 1980, the release of the hostages at the U.S. embassy in Tehran was accomplished by the Iranian acceptance of the Algerian Accords. Unfortunately, that agreement contained the seeds of a violent epidemic of bloody international terrorism that continues to this very day.

The conditions in that agreement for the return of the Iranian frozen assets permitted legal and procedural delays of nearly 12 years, thus inciting Iranian retaliation bombings and hostage-taking. The murder of 241 U.S. Marines by Iranian surrogates—a detonator smuggled into Lebanon by the Iranian charge d'affaires—did not encourage an expeditious settlement of the dispute on the return of the frozen assets.

The Algerian Accords also waived the rights of all hostages in the Tehran embassy to sue Iran for damages. The Iranians viewed this concession as an official abdication by the U.S. Government to protect the legal civil rights of all of its citizens. Thus, Iran and other Nations involved in terrorism against the United States were led to believe that they could murder, injure and kidnap American citizens with impunity, and they have done so. That belief was reinforced by our own Foreign Sovereign Immunities Act that in essence says terrorist Nations may harm American citizens at will and the U.S. Government will not intercede, provide a remedy, or retaliate.

What were the consequences of the Iranian interpretation? At the Beirut airport 241 Marines died; 257 passengers blown out of the sky over Lockerbie, Scotland; 20 Americans kidnapped in Lebanon, of which 4 were murdered; 3 American embassies car-bombed, with many deaths; our post exchange bombed in West Germany; my friend, Ian Spiro, and his family murdered in San Diego, CA, by Iranian hit squads; the Marine casualties in Somalia by Iranian surrogates that were smuggled in from the training bases in Sudan; and the World Trade Center bombing, with 7 deaths and over 1,000 people injured.

If these violent acts had been conducted by Americans or had been conducted in this country, we would be allowed to seek justice in our courts, but when we are harmed overseas we are denied our basic constitutional rights, and that is wrong.

The scope of international terrorism will expand as advancements in nuclear, chemical and biological warfare become available to wealthy States with evil motives. We are all fully aware of the lethal chemicals that are available now out of Russia, and a small amount put into the air handling system of any major building in this country, including any building in this city, would murder thousands upon thousands in a few minutes. Fewer operatives are now required to carry out massive acts of terrorism.

The Foreign Sovereign Immunities Act must be amended to permit any American, with reasonable cause determined by a Federal judge, to sue any foreign Nation which is on or has ever been on the Department of State's list of Nations that sponsor and/or conduct international terrorism. I throw that in as a compromise because I recognize the bureaucrats are afraid that we are going to sue the Irish or sue the French, and so I throw that in as a compromise for a Nation that has ever been on the list of terrorism, as determined by our DOS.

But the most important thing that can be done, and it is crucial and it is critical, is that the statute of limitations be without time limits because the covertness of international terrorism does not readily allow the identification of the terrorists or their sponsors. In less than 6 weeks, the statute of limitations runs out on the people that murdered Colonel Higgins. Since that awful day on July 31, 1989, 5 years have gone by and our bureaucracy has moved slow, slow, slowly.

The constitutional rights of American citizens should not be abridged by diplomatic considerations, bureaucratic bias, and partisan politics. The United States of America, as I was taught in elementary school, is a Nation governed by the rule of law. Congress must amend the Foreign Sovereign Immunities Act, and they must also remove restrictions on the statute of limitations. Failure to do so will only encourage foreign Nations to continue international terrorism on a larger scale.

Most experienced expatriates recognize the limitations of our bureaucratic institutions and their willingness and their ability to help Americans who get in trouble overseas. The failure of the Department of State's counter-terrorism tactics is well documented. It is not in their standard of reference to handle those problems. There are some in the Department of State who support our position. There are many who oppose it, but judges, not bureaucrats, should determine our legal rights.

Congress must act to amend the Foreign Sovereign Immunities Act, and do it now. Failure to do so will only send a confirmation to Nations that engage in international terrorism that they may continue to do so with impunity. Passage of this legislation just might be the most significant act of counter-terrorism ever implemented by our Government. Please let terrorist Nations know today that we will no longer tolerate violence against any American citizen in our country or overseas.

Thank you.

[David P. Jacobsen submitted the following materials:]

PREPARED STATEMENT OF DAVID P. JACOBSEN

Rodney King was guaranteed his legal rights when harmed by agents of our Government; but every American citizen and family member victimized by international terrorists has been denied the right to seek justice by his own government. That is a violation of the intent of the United States Constitution.

The January 1980 release of the hostages at the United States Embassy in Tehran was accomplished by the Iranian acceptance of the "Algerian Accords". Unfortunately, that agreement contained the seeds of a violent epidemic of bloody international terrorism that continues to this day. The conditions in that agreement for the return of the Iranian frozen assets permitted legal and procedural delays of nearly twelve years, thus, inciting Iranian retaliation of bombings and hostage taking. The murder of 241 US Marines by Iranian surrogates did not encourage expeditious settlement of the dispute on our part. The Algerian Accord also waived the rights of all the hostages to sue Iran for damages. The Iranians viewed this concession as an official abdication by the United States Government to protect the legal rights of its citizens. Thus, Iran and other nations involved in terrorism against the United States were led to believe that they could murders injure or kidnap American citizens with impunity and they have done so.

That belief was reinforced by our Foreign Sovereigns Immunity Act that, in essence, says terrorist nations may harm American citizens at will and the United States Government will not retaliate. What were the consequences of this interpretation? 241 Marines dead at the Beirut Airport, 257 passengers blown out of the sky over Scotland, 20 Americans kidnapped in Lebanon of which four were murdered, three American Embassies car-bombed with many deaths, one Post Exchange fatally bombed, my friend Ian Spiro and his family murdered in San Diego in 1992, the Marine casualties in Somalia and the World Trade Center bombing with 7 deaths and over 1,000 injured. If these violent acts had been conducted by Americans, the victims and their families would have been allowed to seek justice in the courts.

The scope of international terrorism will expand as the advancements in nuclear, chemical and biological warfare become available to wealthy states with evil motives. Fewer operatives will be required thus reducing the chances of interception and prevention.

The Foreign Sovereigns Immunity Act must be amended to permit any American, with reasonable cause determined by a Federal Judge, to sue any foreign nation who is on or has ever been on the Department of State's list of nations that sponsor and/or conduct international terrorism. It is critical that the statutes of limitations be without time limits because the covertness of international terrorism does not readily allow identification of the terrorist or their sponsors.

The Constitutional rights of American citizens should not be abridged by diplomatic considerations, bureaucratic bias or partisan politics. The United States of America is a nation governed by the "Rule of Law". Congress must amend the Foreign Sovereigns Immunity Act. Failure to do so will only encourage foreign nations to continue international terrorism on a larger scale.

On the morning of May 28, 1985, while crossing the intersection between the campus of the American University of Beirut where I resided and the University's 241 bed Medical Center where I was the Chief Executive Officer, I was kidnapped by members of Islamic Jihad, an Iranian-sponsored terrorist group. I was held for seventeen months and released on November 2, 1994 which was the day that the Soviet KGB and their Syrian allies leaked the information regarding the sales of arms for the release of American Hostages. My day of release to freedom was one of great joy * * * joy that was soon to be diminished by the vicious partisan politics of Iran/Contra and the creation of a nightmare from knowing that the remaining hostages would be abandoned for partisan political considerations. My friends, Terry Anderson, Tom Sutherland and Joe Cicippio, spent another five years in hell because all efforts to free them were put on hold. Later in my testimony, I will discuss that situation and how my personal efforts to free those men and the other hostages was thwarted by the State Department bureaucracy.

Throughout my hostage captivity, I was held in the same room with Bill Buckley, Terry Anderson, Tom Sutherland, Reverend Ben Weir and Father Lawrence Martin Jenco. In adjoining rooms were French, English, Irish and South Korean Hostages. At times, we were joined in the building by the Saudi Arabian hostage and his wife. Death was a constant cell mate that sleep never dispatched. I shall never forget

being chained a few feet from Bill Buckley and being unable to comfort him in his final moments of life. His last words, "I think I'll have my hotcakes now, with blueberry syrup," will never be forgotten.

Our captivity was not a vacation at Club Med. We were totally isolated from the outside world, constantly living with the threat of death or torture, brutally assaulted physically and psychologically, malnourished, chained like animals to the floor, blindfolded, denied every voluntary activity of daily living and stripped of every right to privacy. Everyone conducted themselves with dignity, honor and great patriotism throughout the ordeal. We never flinched in loyalty to our moral and ethical principles. No one exhibited any signs of the "Stockholm Syndrome." We all became men of conviction, not consensus. Our values did not change, but only how we expressed them. We survived mentally strong. There are no flashbacks, nightmares or excessive reactions to sudden noises and moments. We are all fairly well adjusted and able to function as normal human beings.

During this ordeal, most of us learned that Iran had ordered our kidnapping. The demand by Islamic Jihad to exchange us for the "Dawa Prisoners" held in Kuwait was a clever smoke screen. None of us will ever forget "Ali" the Iranian liaison officer to Islamic Jihad. The leadership role of Iran in hostage-taking is irrefutable. Our government has the evidence. Iran paid millions to their Lebanese surrogate to kidnap and hold Americans hostage. They even paid a bonus at the time of release. In the case of Ben Weir, Martin Jenco and myself, they demanded missiles which added the new dimension of "commercial terrorism" which is believed by many legal scholars to be clearly a violation of the Foreign Sovereigns Immunity Act. Iran has never been punished for their acts of terrorism, and our government forbids the victims and their families to seek justice in our courts. That injustice must be corrected.

What happened to tarnish the joy of being free? I quickly and painfully learned that our government consists of five, not three, branches. They are the following:

1. Executive
2. Legislative
3. Judicial
4. Media
5. Bureaucracy

The day of my release was tarnished by the media and political feeding frenzy of the news of Iran/Contra. The Soviets and the Syrians fully understood the political and media response to the news of arms sales to Iran. The media and, perhaps, most members of Congress did not realize that Iran/Contra put the release of the remaining hostages on hold for five long torturous years. The deal that resulted in the freedom of the remaining hostages in December of 1991 could have been made anytime between the years 1982 and 1991 without political controversy. At the time of my release, a personal friend in one of the intelligence agencies told me that "it is going to be a lone time before your friends come home." And he was right, but I could not accept that statement. It was then that I learned of the independence of the fifth branch of government * * * the bureaucracy.

Through a representative of a major Christian Church, I was introduced to Ian Spiro, a contract agent for the CIA. Ian probably was British MI6 and told a convincing story that he had been brought in by our State Department. Certain actions on his part partially reaffirmed that fact. The project that we worked on was the Israeli concept of creating a not-for-profit educational foundation to teach Lebanese militia men the various artisan trades. This project involved my soliciting five million dollars in seed money from wealthy Lebanese Americans. I had some reservations regarding this project and knew that it could be a cunning sting operation. Church officials said that it was legitimate. I asked friends in the CIA and, after checking, they responded, "He is from deep within the system and has done wonderful things for us in the past. But, Dave, be careful. People do change." The State Department refused to comment on the project although they had previously issued a policy statement supporting independent humanitarian efforts. I had gained the commitment of private money, and the donor wanted confirmation of the Department of State's support. It was not immediately forthcoming, and I withdrew from the project. I will never know if I could have been successful in bringing the hostages home at Christmas of 1987.

I was involved in another personal effort to free the hostages. It involved expanding the number of students in nursing and physician assistants at the American University of Beirut with the intent of opening medical clinics for the Shi-ite refugees in South Lebanon. Sheik Fadlallah could take credit, and perhaps the hostages would be released in exchange for this humanitarian aid. Guess who probably discouraged this project? It wasn't the University or the CIA.

Most experienced expatriates recognize the limitations of the Department of State's willingness or ability to help them if they ever get into trouble overseas. Some of the Department bureaucrats will oppose the proposed amendments to the Foreign Sovereigns Immunity Act for philosophical reasons. But we live in the real world. Judges, not bureaucrats, should determine the legal rights of the citizens of the United States.

I survived that hostage ordeal only to find that my freedom was filled with pain, frustration, discouragement and anger. Upon my return to the United States from Lebanon, I, like other released hostages before and after me, was literally dropped on the streets of Washington DC without money, credit cards or identification. I could have been homeless in Washington DC. Like a released felon, all I had was a new suit given to me by the Department of State. I did not expect a golden parachute nor have I ever asked for anything other than justice and an opportunity to have a meaningful life. The criminals who harmed me are still unpunished.

Even though I was in relatively good emotional and physical shape, I could not resume my career for several years. I sent out over three hundred resumes without a single response and I had to resort to the lecture circuit. My career seemed ruined, retirement plans destroyed and my planned marriage to the love of my life never to be. I never quit as a hostage and I never quit as a free man. I have restored my professional life as a hospital administrator, but I paid dearly by using most of my savings and cash value of various insurance policies.

Iran destroyed my life! I want justice! As an American citizen, I should be entitled to my day in court. Amending the Foreign Sovereigns Immunity Act will protect the rights of every American. It will also guarantee that those rights cannot be prevented by the bureaucracy.

Iran has used the Foreign Sovereigns Immunity Act to avoid punishment for the murder of 241 US Marines, 257 passengers of Pan Am 103, the kidnapping of 20 Americans and the murder of four of them in Lebanon, the bombing of three US embassies, the November 1992 murder of my friend Ian Spiro and his family in San Diego, the bombing of the World Trade Center Building that resulted in 7 dead and over 1,000 injured, the counterfeiting of bogus $100 bills that two years ago totaled over 2 billion dollars and now is much more, the murders of Bill Buckley, Peter Kilburn, Alex Collet, Malcolm Kerr, Robert Stethem, Charles Hegna and William Stanford. The number of victims is increased many fold when you consider all of the family members who, in their own way, are more traumatized.

The end of this statement contains four documents. Three from USA TODAY and a letter from Dr. Adnan Mroueh, AUB Dean of Medicine and a close personal friend of Sheik Fadlallah who is the spiritual leader of all the Lebanese terrorist groups. The Sheik says, "only the Iranian Charg'es D'affaires can do anything to release the hostages."

The Foreign Sovereigns Immunity Act must be amended to permit United States citizens who are victims of international terrorism to sue the foreign government that sponsored, directed and/or participated in the act of terrorism. In order to insure the orderly conduct of diplomatic business, only nations that have ever been or are on the Department of State list of countries that sponsor or participate in terrorism should be excluded from the protection of the Foreign Sovereigns Immunity Act. In addition, there should be no statute of limitations on starting legal actions because of the multi-year delays in identifying the terrorist parties.

International terrorism is not over. The war continues and things are only going to get worse.

Nations that sponsor terrorism do not fear military retaliation or economic sanctions. What they fear is being hit at the bank. Without friends, their civilian populations grow restless not against us but their own leaders.

With the military budget cut-backs and uncertainties of our own foreign policy, terrorism will only increase. Experienced expatriates know too well the limitations of our own State Department and the political considerations of our partisan leaders.

I ask you, I plead with you to amend the Foreign Sovereigns Immunity Act to allow any American with reasonable cause to sue for damages in our Federal Courts the nation that sponsored and/or conducted the act of terrorism. In order to maintain the orderly process of diplomacy, only nations identified as ever being, past or present, on the United States Department of State's list of nations that sponsor terrorism should be sued. The time limitations on the Statute of Limitations must also be removed in all terrorism cases because covert operations hinder the ability to readily reveal the identity of the terrorist party.

Congress must act to amend the Foreign Sovereigns Immunity Act. Failure to do so will only send a confirmation to nations that engage in international terrorism that they may continue to do so with impunity. Passage of this legislation just

might be the most significant act of counter-terrorism ever implemented by our government. Please do not fail in this effort. There are two difficult days in our week * * * yesterday and tomorrow. Let terrorist nations know today, that we will no longer tolerate violence against our citizens.

Family members of victims of international terrorism are also victims. Nothing can more eloquently express this fact more than the following letter sent by my son to President Clinton.

ERIC D. JACOBSEN,
P.O. BOX 1784,
Lake Arrowhead, CA, May 2, 1994.

The PRESIDENT,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: I am the son of David Jacobsen, one of the Americans held hostage in Lebanon by Islamic fundamentalists in the 1989's. During the seventeen months he was imprisoned, I worked diligently on seeking his release through every conceivable means, including meeting on numerous occasions with US government officials, lobbying through the national news media, and even involving myself with "covert" operations outside the normal channels of diplomacy. I would like to take credit for my father's eventual freedom, but I can't; his release was a result of the Reagan Administration's sale of T.O.W. missiles to the government of Iran in October 1986. He is alive and free today because our country traded "arms for hostages" with another nation, Iran, who after receiving the ransom, ordered his release.

Six years have passed since then, and a great deal of healing has occurred, not only for the families of these victims of international terrorists, but also for our nation. That period of my life seems like a long time ago, however, for our family, this crisis has not been resolved fully. We have yet to see a satisfactory close to this horrible, unjust crime committed against my father and other Americans by Lebanese extremists under the influence and direction of Iran. This is the reason I am writing you today. I would like to ask for your help in bringing this to a just conclusion.

In 1992 several ex-hostages, my father included, brought civil action against the nation of Iran in the federal district court of Washington, DC. This case (Docket #92–2300) was a multi-million dollar suit based on the notion of "commercial terrorism", that is, terrorist acts in which a nation (Iran) benefits financially; in our situation, from the kidnapping and imprisonment of my father and others. The judge on the case felt that commercial terrorism was valid grounds for a suit, but he denied jurisdiction, and the case didn't go to trial. He did not rule in favor of the Iranians; instead, he felt it was advantageous to my father and the other plaintiffs to get a ruling on "commercial terrorism" from the appellate court first, rather than rule in favor and then see the case lost for years in the appeal process. This case is currently before the appellate court (Docket #93–7047) and is scheduled to be heard shortly, on May 19, 1994.

While visiting with my father last weekend, he mentioned that the Department of State has not supported us in this effort. Having struggled for nearly a year and a half with the State Department during my father's captivity, this doesn't really surprise me. But it does stir up an old familiar feeling of frustration and aggravation similar to what I experienced in my dealings with State during the time I was the son of a hostage.

I am fully aware of the Foreign Sovereign Immunities Act, and can understand its intent. This is the basis for the State Department's opposition to my father's suit. Apparently they feel that if my father and the others were successful, it would open the floodgates for a huge number of American citizens to bring legal action against numerous foreign countries. While this may appear sound reasoning, it fails to address the positive long-term effects that this case could establish. This precedent would not only be beneficial to our nation, but would serve justice and demand accountability of those nations that support such grievous crimes as terrorism. As it stands today, they are virtually free from accountability because of the Foreign Sovereign Immunities Act. It has, in essence backfired on us.

This is not a frivolous lawsuit. Plenty of hard evidence exists to prove that my father was kidnapped, held hostage, and suffered physical and emotional torture at the hands of terrorists in Lebanon. Sufficient evidence also exists, including the testimony of US government officials, to establish Iran's link to and influence over those who held my father. The fact that T.O.W. missiles were delivered to Iran and my father was released immediately is irrefutable. Was this merely a coincidence? I think any court of law would find that hard to believe.

True, my father gained his freedom. He is not emotionally or physically disabled by the experience. He is working again as a hospital administrator and from all apparent indicators survived his ordeal quite well. However, those who perpetrated this offense against him and his family have, I hate to say it, gotten away with it. Is that justice?

Once again, I can hear the official State Department response to this, one that I heard many times eight years ago: "We don't know who was responsible for your father's kidnapping. They're a mysterious group, with mysterious motives, living in a mysterious part of the world." That wasn't true then; it's not true now. As it came out through the efforts of hostage families, the State Department finally did concede publicly that it did know who was responsible—not only the group (Hizb'allah) but the family (Mousawi) and even the individual in charge (Imad Muhgniya). And behind all of those just mentioned was the government of Iran. No matter what the State Department claimed then, or says today, it is not a mystery, it is a fact. Iran is responsible to a large degree for the crime against my father, my family, other Americans and their families.

Are we motivated by vengeance in seeking punitive and compensatory damages from Iran? No. Surprisingly, we have been able to forgive those who were responsible. In writing this letter, I am not driven by anger. I am not controlled by a desire to "get the people who did this." But, forgiveness does not dismiss accountability for actions. Just the opposite—justice requires forgiveness but demands accountability. Unfortunately, because the individual kidnappers have not been apprehended (but thanks to my father's cooperation, they have been identified), we are not yet able to make them accountable for their criminal actions. However, Iran is equally identifiable, and to release them of their accountability because of a law in this country is unfair, morally wrong, and another injustice committed against the human rights of my father. He deserves to be treated with dignity, and that translates into punishing those who broke his legal and moral rights.

If the appellate court rules that commercial terrorism is valid grounds for a suit, my father stands a good chance of winning his case. Being successful not only benefits my father and the others, it sends a clear message to nations around the world that state-sponsored terrorism will cost them dearly in a way that they will feel and respect the most—money. It wasn't too long ago that the World Trade Center bombing let us know that terrorist acts aren't confined to the Middle East anymore. The security of our borders has already been threatened by terrorists who receive funding from other nations. As someone who has suffered first-hand experience of terrorism, I want to see every step taken to prevent others from suffering as I, my family, my father and other Americans have.

I ask you, Mr. President, I urge you, please support us in our efforts to bring justice to the hostage crisis. It may be over, but it's not forgotten. I ask that you would encourage the Department of Justice to continue in any efforts to apprehend the individuals responsible for my father's kidnapping and imprisonment, and I request that you instruct the Department of State not to oppose my father's lawsuit against Iran, but to support it.

The biggest objection I ever heard to negotiating with terrorists for my father's release was that it would only encourage further acts of terrorism. I don't agree. I think the greatest encouragement to those considering terrorism as a means of political blackmail is the fact that you can do it and get away with it. Please, Mr. President, the facts of this case should be determined on the basis of the same laws that would be applied to anyone accused of such crimes in this country. Let's allow the courts to determine culpability on the basis of law and evidence, not the State Department on the basis of diplomatic convenience.

I am hoping and praying that you will support us in this effort. I regret that this comes to you on such short notice, but I didn't realize the extent of this problem until only a few days ago.

Yours Truly,

ERIC D. JACOBSEN.

الجامعة الأميركية في بيروت
AMERICAN UNIVERSITY OF BEIRUT
BEIRUT, LEBANON

مكتب نائب الرئيس للشؤون الصحية
عميد كلية العلوم الطبية والمركز الطبي
Office of the Vice President for Health Affairs
Dean, Faculty of Medicine & Medical Center

Dear David,

Your letter addressed to Sh. Fadlallah was sent to him. Since Terry Waite was taken from my office, I was very angry & resentful to Fadlallah who said that only the Iranian Chargés D'affaires can do something to release him. All the local agents are mere 'hunting dogs' for the Iranian Regime. Therefore my assessment is that this whole hostage taking must be negotiated politically outside our borders. Therefore all appeals for humanitarian consideration (to individuals, families, institutions, etc.) with limited value. Because of all the abuse, I have kept a distance since Terry Waite was taken. I was angry & shocked —

Sincerely,
Adnan

Cable Address : Amunob, Beirut

CELEBRITY CORNER

A night filled with tortured thoughts

DURANGO, Colo. — It is 3 a.m., and I can't sleep. Tortured thoughts regarding the hostages and their families refuse to leave my consciousness.

Empathy for Robin Higgins and her daughter. The never-ending grief for the relatives of William Buckley and Peter Kilburn. Higgins, Buckley and Kilburn all died at the hands of criminals who hide behind Allah. At least Kilburn's remains came home.

I share with Higgins the memory of putting on the blindfold when hearing the door being unlocked and the words, "Be quiet, come with me," accompanied by the cold pressure of a gun in the back, and then the phrase, "You dead."

They only wanted to scare and hurt me. They intended to kill Higgins, and they did.

What were his final thoughts?

He was probably thinking about his family. He was too tired to care anymore, because nobody seemed to care about him.

When the death threats were made against Joseph Cicippio, his entire family was sentenced to be executed.

For four years, poor Tom Sutherland's wife and three daughters have died a little bit more with each Lebanese crisis.

Terry Anderson's little girl asks every day, "Where's Daddy?" She doesn't know what is happening, and neither does the American public.

What is it like to be a hostage? It's like being a blind rabbit, trapped in an elevator, without fresh air or sunlight, denied every freedom and isolated from everything you love and need.

Your life is on hold, and there are things that you must do, but you can't.

You haven't known kindness or the warmth of an embrace for years.

There is nothing you can do to be free.

David Jacobsen, a hospital administrator, was held hostage in Beirut for 18 months in 1985-86.

DAVID JACOBSEN

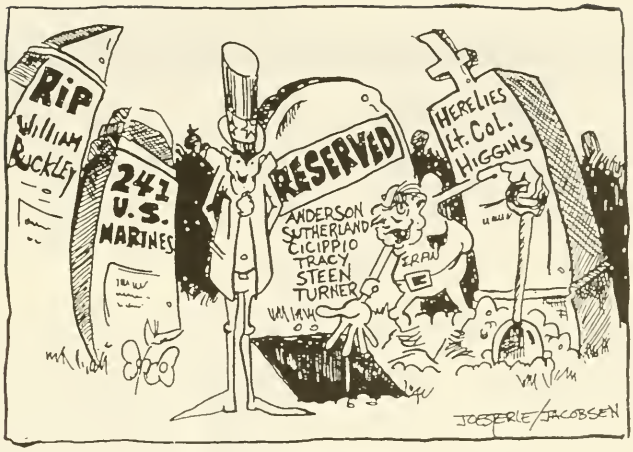
Death is your constant companion and memories your only hope.

Sleep brings no escape.

Just a few days ago, the media, politicians and the public were outraged by the brutality of Hezbollah. There was a sense of urgency, a sense of anger. There was passion to do something, anything.

What went wrong? In hours, the hostage crisis was replaced as lead media item by Donald Trump's opening a miniature golf course in New York City.

I guess the hostages are lucky not to know that.


RIP
WILLIAM BUCKLEY
241 U.S. MARINES
RESERVED
ANDERSON
SUTHERLAND
CICIPPIO
TRACY
STEEN
TURNER
HERE LIES
LT. COL.
HIGGINS
JOSEPH E. JACOBSEN

ABANDONED

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—Allen H. Neuharth
Founder, Sept. 15, 1982

USA TODAY

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President and Publisher

COMMENT

Wake up! International terrorism is here

After a decade of anti-U.S. assaults, why is there still no sense of urgency?

"We can get you anytime" is not an idle terrorist boast. The low level of international terrorism in the United States has been due to a combination of good luck and law enforcement. Eventually, state-sponsored fanatics will be successful.

Rep. Bill McCollum's House Republican Task Force on Terrorism and Unconventional Warfare, which predicted Iraq's invasion of Kuwait, continues to publish reports that are ignored. Sheik Omar Abdel-Rahman's links to terrorism were exposed long ago. Why did we wait so long to act?

It is strongly suspected by many specialists that Iran is the instigator, Sudan the executor and Iraq a diversion that distracts our attention from the real source and purpose of anti-U.S. activities. It's been widely reported that Iran has counterfeited and distributed over $2 billion in $100 bills, and that Sudan now provides a logistical base for training and exporting terrorism.

There are nearly 3,000 Iranian revolutionary guards in Sudan, and if you think they're there as a "peace corps," you'd better read some of the congressional reports on the subject. You might even care to visit Africa to talk with Sudanese and Somali refugees. I did.

Has all-out terrorist war been declared against the United States, and we aren't being told? Are we going to delay responding until a smuggled nuclear bomb is exploded in Washington? Do 250 million Americans deserve as much protection as the spotted owl? Congress eagerly holds hearings on partisan issues like Iran-contra; why the political silence on the question of Iranian, Syrian and Sudanese involvement in terrorist events, both current and past?

AP

By David Jacobsen, a hospital administrator who was held hostage in Beirut for 17 months in 1985-86.

A bipartisan effort is needed.

▶ Hold congressional hearings to publicly identify the state sponsors and purposes of terrorism.

▶ Confiscate all assets of any nation identified as sponsoring anti-U.S. violence.

▶ Develop a military reaction plan that, when initiated, won't stop until the total mission is completed.

▶ Amend the law to make it easier to detain and deport aliens with a terrorist taint and to remove protection for terrorist activities of foreign embassies and missions.

▶ Repeal the statute of limitations on terrorism and mandate federal court jurisdiction for all claims by victims.

▶ Return the 300 FBI agents diverted to urban gang investigations to the FBI's original task of fighting terrorists.

▶ Designate a Defense-Justice-CIA interagency anti-terrorism group, and play by new rules of counterterrorism.

Humanity has many wonderful traits, but a sense of urgency is not one of them. Are we ever going to learn that history prophesies the future? Remember the deaths of the Marines in Beirut, the Pan Am 103 passengers and Islamic Jihad hostages Buckley, Kilburn, Collett and Higgins. Wake up, America!

Senator HEFLIN. Mr. Cicippio?

STATEMENT OF JOSEPH CICIPPIO

Mr. CICIPPIO. Thank you, Mr. Chairman. In 1986, while I was at the American University of Beirut working, a group of Islamic fundamentalists, under the actual direction and control of the Islamic Republic of Iran, abducted me while I was at work. I was held for 1,908 days. During those 56 years, I was moved from one area to the other. I was beaten. They were going to cut my personals off. I was up against the wall half a dozen times, or more. Guns were to my head, saying this is your last moment that you have on this earth.

I was also put into automobiles, trunks of cars. The fear at the beginning was where was this car going? Will I be going off a hill? Will I be going into the ocean? But then you begin to live with those fears because there are just too many of them. Days become longer, and also your mind begins to go and go and go, turn and turn and turn.

There were many, many times that I actually felt it was my last moment on earth, but they always used to tell me, no matter where you are, if we have to go after you, if anything happens, we will go, no matter where it is in the world. They often while I was held gave me this information. They had also told me that, you are held captive because you are an American, because you are very valuable to us, and then by holding you we could do the things that we would not be able to do otherwise.

I come here today and I ask you to work on this new bill to add those things to it that will also help the American while he is overseas so that he has some remedies that he can fall back on, so that he can come home and then know that he has not been forgotten.

While I was sitting here today, I just happened to be thinking, it is my turn to come up, and yet I noticed that those who were here prior who actually represent me in my own Government did not have the time to hear my remarks. I felt very, very hurt about that, and if they do it here, what will happen overseas? Will they also walk out on us overseas? I was very appalled at that. It really hurt that those who were here to represent the U.S. State Department and also the U.S. Justice Department did not have time to hear us, the Americans, but they had time to let you know that what happens to us cannot interfere with their relationships to others around the world, countries around the world. This is not in my prepared remarks. I feel very hurt about it.

I put 5 years of my life, 4 of it chained to a wall—my whole life was just 3 feet for that whole 5 years. I did not see the sun, daylight. I did not know what was happening in the outside world. I did not know, also, that my oldest boy died. I was not told any of these things, but I had been told time and time again, don't worry, you will be going home if you don't do anything.

We used to ask those who held us, what is happening on the outside, what is the American Government doing to protect us or to talk for us. So they used to come back and say, there is no news, no one wants to actually talk on your behalf. I would hear this for month after month, year after year; the Americans will not talk to us, so you will have to remain here.

Then over the years you begin to realize, are we forgotten? Are we on the back pages? What has happened to those who are in office to protect us? Your mind begins to wonder and wonder and wonder. Thank goodness for the American people when I was released that, you know, we were not forgotten. The whole world came to me and said, we were with you and we prayed for you everyday that you were held, and that was such encouragement to me to know that I had the support at home. Yet, those who could have helped more were not there to give it.

Thank you, Mr. Chairman.

[The prepared statement of Joseph Cicippio follows:]

PERSONAL STATEMENT

INTRODUCTION

On September 12, 1986 a group of Islamic fundamentalists under the direction and control of the Islamic Republic of Iran abducted me from the American University of Beirut were I had been working as Deputy controller. My captivity lasted for a period of 1908 days during which time I was subject to continuous beatings, inhumane treatment as well as medical experiments. During my captivity I was paraded in front of the world press and forced to read prepared statements condemning the very country I call home. I was not alone. David Dodge, Frank Reiger, Jeremy Levin, Rev. Benjamin Weir, Rev. Lawrence M. Jenco, Thomas Sutherland, Frank Reed, Edward Tracy, Robert Polhill, Alann Steen, Jon Turner, and Charles Glass were all subject to the same fate. I hesitate to call myself and my brothers lucky however at least we escaped with our physical well being. Many were not as fortunate. Lt. Col. William Higgins, William Buckly, Dennis Hill, Peter Kilburn, Leigh Douglas, Philip Padfield, Alec Collett and Michel Seurat all lost their lives while being held captive in Beirut, Lebanon.[1]

The question lingers, why such a long list of shattered lives and who was responsible for these atrocities. The Answer has become increasingly clear: The Islamic Republic of Iran directed, financed and controlled the abduction, confinement and torture of the above men in an effort to coerce the United States Government into releasing Iranian funds held in United States Banks as well as to force the Government into the sale of TOW misles and other armaments. This is not speculation or fantasy this is the cold hard truth supported by Special Prosecutor Lawrence Walsh in the Iran Contra-Hearings. To support these facts one need only look to the flow of money and weapons between this country and Iran and its relationship to the release of the above individuals.

Despite the grotesque and repugnant character of the Iranian Governments actions in all likelihood the Foreign Sovereign

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[1] The author realizes that many of these men are not American citizens and would not have standing to sue under the proposed changes to the FSIA however, they can not and will not be forgotten.

Immunities Act as currently enacted does not allow any type of recovery for myself and the others who were held captive.[2] We are here today to persuade the members of the panel that an amendment to the Foreign Sovereign Immunities Act is necessary in order to prevent the future abduction and confinement of United States Citizens who are working abroad.

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[2] Myself as well as David Jacobson currently have an Appeal pending before the United States Court of Appeals for the District of Columbia Circuit. The main issue is whether the current Foreign Sovereign Immunities Act permits recovery for confinement ant torture of myself an Mr. Jacobson.

THE ABDUCTION AND CONFINEMENT

As I made my way to work on morning of September 12, 1986 on the campus of the American University of Beirut three men approached from the rear, pushed me to the ground, pistol whipped my skull and threw me into the back seat of an adjacent vehicle. This was the beginning of five (5) years of cruel confinement, where the tortures of beating and hunger were secondary to those of loneliness rage, and bewilderment. Maddening boredom alternated with stark terror. I would be totally cut off from my loved ones, never see the sun or the stars, never read a newspaper or receive a letter. And for four years of my captivity, I would be chained to a tragic American Hostage, whose rapidly deteriorating mental condition often made him a burden to reside with.

During my confinement I was subject to the most inhumane conditions possible. I was chained to a radiator for the majority of my confinement and forced to reside on the balcony of a building were the temperatures often fell below freezing. I was subject to constant interrogation and the customary beatings that went along with these sessions.

I became ill in September of 1991, violently and painfully ill. I was stricken with terrible abdominal pain that left me weak and trembling. I couldn't stand or eat or sleep. Eventually my captors summoned a surgeon who performed an examination. It was determined that surgery would be necessary and I was immediately taken in a trunk of a vehicle to the Hospital. Surgery was performed and I remained in the Hospital for a period of five days. I mention this experience because it made me realize that the party responsible for my abduction was no mere rogue organization. They were part of a vast highly skilled, government supported network. They had been financially well supported, with excellent communications and access to anything they pleased.

THE RELEASE

On November 4, 1991, I was unexpectedly moved to another location. It was a great improvement over the "hate House", where the walls had been blackened over with what I suspect had been a stove fire, leaving a lingering stench in the air. On November 25, 1991 I was moved again, my captors had little problem handling me as my weight had shrunk to 130 pounds. Finally, upon reaching my destination I was told that I would be going home. I did not believe my captors at first as this had been told to me numerous times in the past only to be rejected. I was permitted to bathe and was supplied with shoes, slacks and a sweater. Eventually I was loaded into a large cardboard appliance box and placed in the back of a vehicle. I still did not know if I was going to be free or dumped into the Mediterranean Sea. On a deserted stretch of road, outside of Beirut, I finally encountered freedom for the first time. My captors unloaded me from the box and instructed me not to open my eyes until they left or risk being shot. I complied with their request. I heard the sound of an approaching automobile and soon heard an individual call my name. It was an envoy from the Syrian government who quickly shuttled me away to Damascus. Freedom had finally come.

The purpose behind recalling these events is to allow the members of the committee to understand, in a personal and up close fashion, the pain and suffering all of the Hostages had to endure at the hands of the Iranian Government. The same feelings of isolation are being relived once again as we seek reparation for our years of confinement. I wish to turn the committee's attention to the following analysis of the current Foreign Sovereign Immunities Act as well as the reasons why it is imperative to amend the Act.

THE FOREIGN SOVEREIGN IMMUNITIES ACT

In The Schooner Exchange v. McFaddon, 11 U.S. 116, 136, 3 L.Ed. 287 (1812), the Supreme Court adopted the common law doctrine of foreign sovereign immunity. As noted in The Schooner Exchange, the doctrine of foreign sovereign immunity rests upon comity between nations. Id. at 135-36; Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486, 103 S. Ct. 1962, 1967, 76 L.Ed. 2d 81 (1983).

This doctrine began to erode when the State Department declared that matters regarding foreign sovereign immunity were executive issues best handled by the State Department. In what has been deemed the now famous "Tate Letter", the Acting Legal Advisor of the Department of State to the Acting Attorney General stated, "it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in consideration of requests of foreign governments for a grant of sovereign immunity. 26 Dept. St. Bull. 984, 985 (1952). According to this modern theory:

> A state may be held liable in the courts of another nation if it engages in an industrial, commercial, financial or other business enterprise in which private persons may there engage, or does an act there in connection with such an enterprise wherever conducted, and the proceeding is based upon the conduct of such enterprise or upon such act. Article II, Draft Convention on Competence of Courts in Regard to Foreign States.

In 1976, Congress codified what was at the essence of the 1952 Tate letter. Congress' efforts led to the creation of the Foreign Sovereign Immunities Act. The FSIA grants sovereign states immunity unless their activities fall under one of the five exceptions. However, sovereign immunity should be regarded as the exception rather than the rule, and should be confined to a foreign sovereign's truly governmental acts and not extended to strictly commercial activities. McDonnell Douglas Corp. v. Islamic Republic of Iran, 758 F.2d 341 (8th Cir. 1985). Further, a commercial claim against a foreign state on the merits does not affront the

11315 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 31 (1976) (Testimony of Bruno A. Ristau)].

The Act reflects Congress's solicitude for the "rights of both foreign states and litigants in United States Courts. 28 U.S.C. Section 1602. Its history takes note of, among other things, "the growing number of disputes" between American citizens and foreign states and "expresses the desire to ensure" that "our citizens will have access to the courts in order to resolve ordinary legal disputes." (emphasis supplied) See H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6-7 (1976), reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6604-06 (hereinafter "House Report").

It is important to note that when the FSIA was enacted United States Citizens were not being systematically abducted throughout the world by foreign governments to be used bartering chips. In 1976 Congress and in turn the State Department was dealing with a much different world than we are faced with today. It was not until the late 1970's early 1980's that the middle eastern nations began fostering aggression towards United States Citizens. Before this time the democratic governments of the West as well as Eastern Block countries of Europe did not engage in the abduction of United States Citizens. Perhaps the most memorably example of the changing of the world order came from Iran itself when in 1979 a militant student coalition under the direction of the Ayatollah Khomeni, seized control of the United States Embassy in Tehran. Clearly these problems were not prevalent or foreseeable when they act was drafted. It is the intention of the Hostages to persuade this committee to allow the proposed changes to the Act to prevent this type of activity from occurring again. If the nations of the World are placed on notice that they will be held financially accountable for their actions against United States Citizens traveling abroad it will act as a positive deterrent. I wish now to turn my analysis towards the benefits to the proposed changed in the Act.

AMENDMENTS TO THE FSIA

As stated previously it has long since been the concern of law makers as well as the State Department to persuade private individuals from suing Foreign Governments when they are acting in a purely Sovereign Capacity. As hostages we understand the reasoning behind that policy and why it is necessary to have safeguards to that effect in place. However, the proposed changes to the FSIA will not impede upon that "sacred" area. What we are looking to do is deter the arbitrary detention, torture and confinement of United States Citizens abroad. We know of no government that has an established national policy that allows for hostage taking. Further, any Nation that does engage in conduct of this nature surely could not call their actions "sovereign." The acts which were committed upon us were purely of a private nature and were not done to protect any national security interest of the Iranian Government nor to promote an established national policy. These were cruel hard acts of terrorism. By allowing the proposed changes to the FSIA to become law this country will be sending a clear message to the world community: If you decide to arbitrarily abduct, confine and torture United States Citizens you will be held financially accountable in the courts of this country.

By holding foreign governments financially accountable for their actions it will in all likelihood deter this type of conduct from happening again in the future. This committee can not change what has happened to the Beirut Hostages but it can prevent this type of conduct from occurring again as well as give those who were aggrieved an opportunity to be compensated.

With any change in the laws of this country there is an overriding concern that the new cause of action will create a "flood of litigation" which will overburden the courts. These proposed changes will not have that effect. The number of individuals who would fall into the subject classification would be limited to U.S. Citizens who were arbitrarily abducted and tortured

who oppose these proposed amendments can not point to an overwhelming number of individuals who would have standing to proceed under the Act. Accordingly, we submit the act would be confined to those individuals who have a legitimate justiciable claim.

The final area we would like to address deals with the State Department's potential opposition to the proposed amendments. The State Department has continuously resisted our efforts to seek reparation from our captors. As stated previously the State Department believes that matters dealing with foreign nations involve national interest and are best handled by the Government and that our Court system should not become involved. We believe that when an individual spends five years of his life arbitrarily confined at the hands of a foreign nation that person has a right to know the reasons behind his detention. A foreign Sovereign that engages in the type of conduct as alleged herein should automatically loose the privilege of Sovereign Immunity. The determination of what an aggrieved party has the right to know should not lie in the hands of our State Department but rather in the capable hands of the Judges of this Country. If a Foreign Sovereign wants to systematically abduct U.S. Citizens working, living or traveling abroad they must be held accountable for their actions and no alleged risk of National Security should prevent the aggrieved party from having their chance at reparation.

CONCLUSION

In Conclusion the present version of the FSIA does not give us any chance of reparation against our captors nor does it provide a deterrent to these men from performing these gross atrocities in the future. Unless these proposed Amendments become law the actions of our captors will continue. In recent years we have seen terrorism first hand in this Country it is time to put an end to this madness. We urge you to turn the proposed amendments of the FSIA into law.

Joseph Cicippio

Senator HEFLIN. Mr. Hall?

STATEMENT OF CLINTON A. HALL

Mr. HALL. Thank you, Mr. Chairman. I appreciate having the opportunity to be here today. There is little I can add to the testimony that has already been given. I would like to characterize what happened to me.

My name is Clinton Hall. I am a retired major in the U.S. Army. What led up to my abduction by the government of Iraq is I was working in the State of Kuwait helping to clear up the munitions and things left behind by the coalition forces and by the Iraqis. In the process, I was abducted at gunpoint by military personnel from the Iraqi government within the territory of Kuwait.

I was taken to Baghdad, placed in a prison cell, removed of my clothing, subjected to being in a closed cell, 8-by-8, no lights, no windows, no facilities of any kind, water or toilet facilities, and basically deprived of any humane treatment. Although I wasn't physically injured in any way, I was told in graphic detail of the things that would happen to me in order to obtain information—removal of fingernails, cutting off of joints, subjection to electrical shock of personal parts.

In the process of interrogation, I was asked everything about me personally that I could possibly be asked, including, you know, who my relatives were, where they lived, telephone numbers, addresses. There is not anything about me now that the government of Iraq does not know. I also am concerned about the long-term effect, as Mr. Cicippio pointed out, with this information.

I think that the bill that is before the Senate and the one that has passed in the House subcommittee are very important to American citizens and I urge the Senate and the Congress of the United States to pass those bills to give Americans their rights.

[The prepared statement of Clinton Hall follows:]

PREPARED STATEMENT OF CLINTON A. HALL

Clinton A. Hall, also known as Chad Hall, is a retired Major in the United States Army. During his active duty time he worked as an Explosive Ordnance Disposal Officer. After his retirement from the Army he worked as a General Manager and Vice President for a General Contractor and was self-employed as owner of a sand and gravel company.

On June 1991, Mr. Hall traveled to Kuwait to become employed by Environmental Health Research & Testing. He commenced working in Kuwait desert and did so until October 8, 1992, at which time he was abducted out of the Kuwait desert by Iraqi military officers.

Prior to his abduction, Mr. Hall was aware of several "border incidents" involving citizens of other nations, including Britain, Sweden, Pakistan and the Philippines. He was aware of two British subjects who were arrested at the Iraq-Kuwait and Iraq-Turkish borders several months prior to Mr. Hall's abduction. Both British subjects were imprisoned in Baghdad and only recently released.

On the 8th day of October, Mr. Hall was working in the Demilitarized Zone (DMZ), approximately one kilometer from the Kuwait-Iraq border and about 1 and one-half kilometers from the town of Umqsar and about 200 meters from the United Nations (UN) outpost of Camp Cohr. Mr. Hall had two work crews in that area which were working in the southern edge of the DMZ removing barb wire entanglements and dismantling trunk lines and bunkers that had been left behind by the Iraqis during their occupation of Kuwait.

In another area, about a 1000 meters south of Kuwait-Iraq border, Mr. Hall had a second work force doing very much the same work but included removal of explosive munitions. During the day of 8 October, Mr. Hall would go back and forth between these two work elements to supervise their work and check on their progress.

At about 10:00 a.m. in the morning, while returning from visiting his element in the South of the DMZ, Mr. Hall approached the work crew closest to the border and found all of his people and equipment standing idle. Mr. Hall observed an Iraqi Patrol Vehicle. Concerned about the welfare of his work force, Mr. Hall approached the group with caution and then noted there was also an U.N. Patrol Vehicle. Presuming that, with the presence of the UN representative, there would not be a problem, Mr. Hall approached the group, dismounted from his vehicle and introduced himself as the Project Manager and Supervisor for the people that were working in that area. His work group consisted of nationals from Syria, Nepal, Bangladesh, and Pakistan; all of which had moderate understanding of English. After introductions, the senior Iraqi Officer asked Mr. Hall why his work force was inside Iraq and what authorization he had to be there. Mr. Hall advised the Iraqi Officer that his people and equipment were not in Iraq but in Kuwait as verified by the United Nations Sub-Polar Survey Team and coordinated and verified by independent survey using the Global Positioning System. The Iraqi Officer did not accept either basis. Mr. Hall asked verification by the U.N. Officer who concurred that Mr. Hall and his people were in fact inside of Kuwait. The Iraqi Officer did not accept this explanation either and insisted that Mr. Hall accompany him and the other Iraqi Officer to Iraq to meet with his commanding officer. Mr. Hall advised that he could not do so since he did not have an entry visa, at which time he was assured that it was not necessary and that would only be gone for a short while and Mr. Hall would be returned immediately thereafter. Mr. Hall refused to go but suggested that possibly the two Iraqis could accompany himself and the U.N. Officer to the U.N. outpost on Camp Cohr and seek resolution by the U.N. The Iraqi Officer refused. Mr. Hall then suggested that possibly their commander would come to the border where he and Mr. Hall could discuss the problem of location. The Iraqi Officer stated that his commander would not do that.

With a last hope of negotiation, Mr. Hall stated he would accompany the Iraqis to see their commander only if the U.N. Officer "a Bangladesh Officer" also go along. Turning at that moment to talk to the U.N. Officer for approval of his request, Mr. Hall found the U.N. Officer had departed the area. Presuming that the U.N. Officer had gone for help, Mr. Hall conducted a dialogue with the Iraqi Officers to assure that his personnel and construction equipment would not be taken across the border. This exchange lasted approximately 30 minutes at which time Mr. Hall became aware that the U.N. Officer was not going to return.

At this point in the conversation, one Iraqi Officer advised Mr. Hall that he was a Major and the other Officer a Colonel. Mr. Hall's Pakistani Supervisor, that was working for him, intervened in the conversation and advised that Mr. Hall was a General. At this point the Iraqi Colonel stepped over to his parked Patrol Vehicle and removed a 9mm pistol. Standing about three feet from Mr. Hall, he pointed the pistol at him and stated "you will come with me or I have the authority to shoot you". At this point. Mr. Hall again entered into negotiations with the Iraqi, under duress with a pistol being pointed at him, and obtained agreement from the Iraqi that they would let his people and equipment go if he would go with them. Mr. Hall agreed and got into his vehicle with the Iraqi Colonel. Mr. Hall as driver with the Iraqi Colonel sitting next to him in the passenger seat with the cocked pistol in his rib cage. As Mr. Hall started the vehicle he observed the Iraqi Major directing his people to get on the equipment and point it north towards Iraq. Mr. Hall turned to the Iraqi Colonel and asked why the Major was taking that action since they had agreed to take only him and let his people go. The Iraqi Colonel stated very frankly "I have changed my mind". At that time Mr. Hall turned off the ignition to his truck, told the Iraqi Colonel he could not accept that and would not go with them. As he opened the door to get out of the vehicle, the Iraqi Colonel warned him not to get out or he would shoot him. As Mr. Hall stepped around the door of the vehicle the Iraqi Colonel got out of the other side of the truck, laid the weapon across the hood, told Mr. Hall to get back in the vehicle immediately or he would be dead. At this point the Iraqi Major observed what was taking place, came forward and asked the Colonel what was happening. The Colonel appraised him of the situation in Arabic. After a short discussion between the two, the Major turned to Mr. Hall and said "if we do as we had agreed, would you go with us?" Mr. Hall said "yes, but only after my people have got on the equipment and left the immediate area." The two Iraqis again consulted and agreed. Mr. Hall called his supervisor over, directed him to get the men and equipment immediately out of the area and as soon as he observed the Iraqis taking Mr. Hall toward the border that he go immediately to the U.N. outpost at Camp Cohr and report Mr. Hall's abduction to the U.N.

When Mr. Hall got back in the vehicle again with the Colonel, the Colonel again placed the cocked pistol in Mr. Hall's side and directed him to drive into Iraqi, approximately 1 kilometer away. The Iraqi Major followed in their Patrol Vehicle.

After crossing at the border check point the Iraqi Colonel directed Mr. Hall to pull over and that the Major would drive Mr. Hall's vehicle. At this point there was a large group of Iraqi personnel standing around and as the Major exited his Patrol Vehicle he was asked who had they captured. He responded that they had an American. The group started to approach Mr. Hall's vehicle, all talking very loudly. At this point Mr. Hall was outside his vehicle and became ever more concerned about his welfare and moved very quickly to the vehicle and got in the passenger side, closing, locking the door and rolling up the window. At this point the Colonel had pushed himself into the back seat of the vehicle directly behind Mr. Hall and as Mr. Hall sat down in the passenger seat, the Colonel placed the cocked pistol into the base of his head and advised him not to do anything or he would be shot. Still assuming that they were just suppose to go to the border and talk with their commanding officer, however, the two Iraqis continued into Iraq. It soon became evident to Mr. Hall that their command base was not where the Iraqi Officer said it would be. This became even more evident as they drove through the town of Umqasr and continued north. Shortly after crossing the 10 kilometer line that marked amount of damage of the DMZ on the Iraq side they proceeded to the town of Basra which was approximately 90 kilometers north of where Mr. Hall was abducted. The route along the road was very rugged and uneven caused by the severe damage imposed by the coalition forces. Mr. Hall was very concerned about the cocked pistol that was being held on him.

Upon arriving at Basra, Mr. Hall was confined in a small room which had no toilet, no water and no bed. He was seated in a chair and told to wait for someone to speak with him. He was questioned in English by an Iraqi who said he was a graduate of the University of Illinois. That man said they had made a mistake but that the decision to release Mr. Hall could only be made in Baghdad. Not withstanding that admission, Mr. Hall was confined for eleven hours without food, water, bathroom privileges or a bed.

Needing to use bathroom facilities. Mr. Hall cried for help or for the attention of a guard. No one responded. He tried the door to his room and found it unlocked. He left the room in search of a bathroom and possible escape. However, he encountered an Iraqi soldier armed with an AK–47 who told him to stop in Arabic. The guard allowed Mr. Hall to use the bathroom and returned him to the room which was now locked, where he spent the night in a chair. He was confined for a total of 27 hours without any food or water. The next day he was transported, again at gunpoint.

The Iraqis decided to transport Mr. Hall to Baghdad and since air transport could not be used, he was transported in a civilian car, a small two-door Fiat, and on the trip was accompanied by three Iraqis. The total trip took approximately 12 hours and during the trip Mr. Hall was told by these three Iraqis that any information that they wanted from him he would give them or they would take whatever measures were necessary to gather that information. Included in their comments were "removal of fingernails", "cutting off fingers and toes", "peeling his skin off" and the application of "electrical shocks to his personal parts". Mr. Hall assured these persons that it was not necessary to torture him. Within the bounds of propriety, he would provide whatever information was required. During this period the Iraqi also described what they would do to President Bush if they could get their hands on him. All during these conversations Mr. Hall tried to engage his captors in talking about their families, their welfare, general conditions in Iraq, the fact that Iraq and America had been allies before the war with Kuwait and would probably be allies in the not too distant future after the hostilities.

In Baghdad, he was taken to a converted parking garage which was used as a jail. The floor and walls were concrete. There were no windows and the door was solid. There was no electricity, food, water, or toilet facilities in his jail cell. He was required to strip naked in the presence of five Iraqi officers. He was then given prison striped pajamas to wear. He was confined in total darkness for four days. He was fed only once a day during his confinement. Upon entering the cell, he was confined from 2:00 p.m. to 9:00 a.m. the next day without bathroom facilities.

During the early part of this stay in the prison in Baghdad, Mr. Hall was blindfolded and taken from his cell. He was told that he was being taken to the interrogation room for questioning.

During this interrogation Mr. Hall was questioned extensively daily as to how and what he was doing in Kuwait; who he worked for; and was he in the military; had he ever been to Iraq before? They asked about his family to include names, addresses, and telephone numbers. They asked about the status and conditions of living in Kuwait and the general feeling of U.S. people about the Iraq-Kuwait conflict. They stated that on the basis of illegal entry that Mr. Hall could expect up to 20 years imprisonment.

When Mr. Hall was taken to the toilet facilities, he was not given toilet paper and told to use his hand. After this was done he was denied the right to wash his hands. Something he was given, presumably the water, caused him to have diarrhea which made the situation even more uncomfortable.

During the time he was in jail he heard other prisoners, including females, scream as if in pain. From the sounds he heard it sounded as if people were being tortured. Mr. Hall feared for his life at that point.

On the fourth day of his confinement Mr. Hall was told he would be shaved. He was allowed to wash at a sink and then was seated and a portion of each side of his face was shaved. He was then taken to a room where an Iraqi in civilian clothes asked him if he had been mistreated. His response was that it was what he had expected. Then three people were brought into the room; a Russian Colonel, a Kenyan Major and an Australian female civilian. These three United Nations representatives and an Iraqi Colonel flew from Baghdad to Umqasr in a Russian aircraft.

On the afternoon that Mr. Hall was turned over to the U.N. in Baghdad, they were supposed to fly out that afternoon but due to failing light conditions and due to the fact that there were no lights at the airfield in Umqasr. It was decided that Mr. Hall would remain overnight again in Baghdad.

The Iraqi wanted to take Mr. Hall back into their custody but thanks to the assistance of the Russian Colonel with the U.N., Mr. Hall was placed in accommodations with other U.N. personnel to be transported the following morning to the Iraq airfield.

Apparently, during the evening, the news media was able to locate the hotel where Mr. Hall was being kept and in the morning prior to his departure the media occupied the lobby in order to acquire pictures. The U.N. slipped Mr. Hall out the back door of the hotel into a waiting car but one news team from the BBC had anticipated this and took pictures of Mr. Hall coming out the back of the hotel. This was the first pictures released that showed he was in good condition and being released. During Mr. Hall's stay in the hotel the room was guarded by two Iraqi soldiers who accompanied him and stood guard during a dinner which was attended by the senior U.N. Mission personnel and the Polish Ambassador who was responsible for the U.S. interests in Iraqi.

The following morning the U.N. personnel drove Mr. Hall to Iraqi's airfield, placed him on a U.N. plane to transport him to Umqsar. During this trip and until Mr. Hall was turned over to the U.N. at Umqasr Mr. Hall was escorted and in custody of an Iraqi Colonel.

At Umqsar Mr. Hall was officially turned over to the U.N. where he was administered a cursory physical, was placed back on the airplane which then transported him to Kuwait where the U.N. turned him over to the U.N. Ambassador at Kuwait.

After debriefing by the U.S. Embassy security, Mr. Hall was allowed to call his family and then attend a briefing for newspapers. Later that afternoon Mr. Hall flew to the U.S. to Washington, D.C.

Since that time a suit has been filed on behalf of Mr. Hall against the Republic of Iraq in Cause No. 92–2842–JHG in the United States District Court for the District of Columbia. The Head of Ministry of Foreign Affairs was served by agents of the Polish government in Baghdad, through diplomatic channels required by the United States Code, Foreign Sovereign Immunities Act. For many months no action was taken in that suit, it being the advice of Mr. Hall's attorney to wait until the pending legislation in both the House and the Senate was acted upon to clarify the issue of foreign sovereign immunity. However, in February 1994, Mr. Hall's attorney was contacted by an attorney who has been retained by the Republic of Iraq to contest the jurisdiction of the court. The default of Iraq had been taken in that suit in as much as the Republic of Iraq had not responded within the requisite sixty days allowed by United States law.

The Republic of Iraq has now filed a Motion to Set Aside Default, which is pending in the court and has lodged a Motion to Dismiss for lack of Jurisdiction, which will be heard in the event the court sets aside the default.

The pending bill introduced by Senator Specter clarifies the issue of jurisdiction of the court which will allow persons who are mistreated either physically or mentally, as was Mr. Hall, to seek redress in the U.S. courts. It further provides for levy and execution on assets of a foreign country found in the Unites States in order to satisfy any judgment rendered. The Specter bill is restricted to those specifically designated terrorist nations, including Iraq and Iran, with whom the United States does not have diplomatic relations. Passage of the bill will assure Americans who are mistreated by foreign governments, particularly those which operate outside their territorial boundaries as have Iraq and Iran, the right to pursue an appropriate remedy in the United States Courts and to seek and receive compensation for their injuries.

Mr. Hall continues to suffer today from the effects of his confinement and the terrorist tactics employed by the Iraqis. He continues to remain under the care of a physician for the several symptoms which he experiences now which he did not experience prior to his abduction and confinement including insomnia, claustrophobia, and sexual dysfunction. Mr. Hall urges passage of the bill.

Senator HEFLIN. Mr. Sofaer?

STATEMENT OF ABRAHAM D. SOFAER

Mr. SOFAER. Good morning, Senator. It is a pleasure to be here with you, sir, and an honor to be at this table with these gentlemen. Thank you for inviting me to present my views on this bill and its counterpart in the House of Representatives, H.R. 934, which would amend the Foreign Sovereign Immunities Act by making an exception to that immunity for certain cases in which American citizens are the victims of State-sponsored torture or other abuse of human rights.

Without such an amendment, Senator Heflin, it is quite clear that victims such as are at this table today—Mr. Cicippio, Mr. Jacobsen, Mr. Hall, Mr. Princz—and such as the clients of my firm, Scott Nelson and James Murkowski, and of the firm of Mudge Rose—and Mr. Garment is here, as well, today, Mr. Heflin—will never get any kind of relief.

It is clear that the act doesn't apply to this sort of conduct when it occurs overseas. It does apply to the similar torts that are committed here, so conceptually there is no difference in that sense. In fact, torts committed here can raise the same sensitivities for the U.S. State Department and our executive branch that torts that are committed abroad raise, and we have to deal with those sensitivities. We are learning to, but we are not learning very fast.

The Torture Victim Protection Act is limited to individual defendants and you will have lawsuits only when you can get an individual defendant who committed torture here in the United States, and then you would be limited in what you could collect.

We know that espousal simply does not work in these cases. Senator, I was here many times with you as a State Department official. We have our duties and we are competent, and the people who appeared before you today are exceptionally competent, but they are playing a certain role. Their interests are limited to the office, as Madison so eloquently wrote in the Federalist Papers. We need something other than espousal.

Senator Heflin, you would not, and none of us would entrust our rights, our health, our lives to the hands of individuals such as who testified here today. Their purpose, their aims are too broad; they are not directed to the protection of the individual Americans that are affected. It takes a lot in the State Department, Senator, to fight for an individual American when a foreign State is involved. We have been waiting years for a decision on espousal in the *Nelson* case and we have not yet received it.

Of course, there are dangers to amending the Foreign Sovereign Immunities Act, but those dangers can be overcome by careful analysis and responsive testimony. The testimony you received today was not responsive to the relatively few dangers that are in this legislation. I think that as long as it is limited to American citizens, I believe it should be amended to eliminate the reference to international terrorism as a standard and we should include in

that law hostage-taking and other clearly defined acts of international terrorism.

So long as we have an exhaustion requirement—and the one additional suggestion I would have, Senator Heflin, is a requirement that an international tribunal be convened in the event the State objects to our courts. So long as those changes are made, I simply don't see any reason why the United States cannot cope with the resentment that might occur in a foreign country, even a friendly foreign country. I would not limit this bill to States on the terrorism list. I don't think that that is a principled way to go about this.

So having experience with these issues for many, many years, including having settled, Senator Heflin, the case of the *Letelier* bombing myself—I led the negotiation on that—and having settled the Starr claim with Iraq and the claims in The Hague with the Iranians, I can tell you I have no doubt that the United States has the moral strength and the means to make this kind of a declaration stick so long as it is carefully drafted and implemented with the sort of commitment to human rights that I have no doubt the present President of the United States has.

Indeed, I am really surprised that this administration, which says, and I believe it is true, it is committed to the advancement of human rights in the world, would not take this bill and use it as a practical and constructive means for implementing that commitment.

I thank you, Mr. Chairman, for inviting me to testify here today.

[The prepared statement of Abraham D. Sofaer follows:]

PREPARED STATEMENT OF ABRAHAM D. SOFAER

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: Thank you for inviting me to present my views on S. 825. Like its counterpart in the House of Representatives, H.R. 934, this legislation would amend the Foreign Sovereign Immunities Act ("FSIA") by making an exception to sovereign immunity in certain cases in which American citizens are the victims of state sponsored torture and other egregious violations of human rights. Legislation is necessary to ensure that when such violations occur, American citizens are not denied the right to a fair hearing in a neutral forum.

In 1976, Congress enacted the FSIA to ensure that our citizens have access to the courts in this country to resolve ordinary legal disputes involving foreign states. While the focus of the FSIA was on commercial disputes, the Act also provided an important exception to the general principle of immunity in cases involving personal injury and death as a result of the tortious conduct of a foreign state occurring in the United States. This "non-commercial tort" exception to sovereign immunity applies to gross abuses of human rights perpetrated by foreign states on U.S. territory, as in *Letelier* v. *Republic of Chile,* 488 F. Supp. 665 (D.D.C. 1980), and more recently in *Liu* v. *Republic of China,* 892 F.2d 1419 (9th Cir. 1989), *cert. dismissed,* 111 S. Ct. 27 (1990).

The FSIA did not provide a remedy in U.S. courts, however, for torts committed outside the United States. In general, this remains sound policy. Foreign states in which such torts are committed ordinarily provide an adequate and more appropriate forum for such cases. Moreover, in the absence of a substantial nexus with the United States, providing a forum in the United States for such cases could represent an extra-territorial extension of the jurisdiction of our courts to adjudicate that is not warranted by international law. The time has come, however, to adopt a limited exception to this general policy.

The proposed legislation would, in effect, expand the non-commercial tort exception to certain egregious human rights violations perpetrated against U.S. citizens, even where the conduct occurs outside U.S. territory. Permitting such cases to be heard in our courts is justifiable under international law because the prohibition against torture and similar abuses is so fundamental and so widely accepted among

nations as to render inapplicable the normal rules against extra-territorial assertions of jurisdiction.

The proposed legislation properly incorporates certain safeguards. First, the exception applies only to American citizens. While it is appropriate that we provide a forum for our citizens when their most basic human rights are violated and no other remedy exists, we have neither the duty nor the capability to open our courts to any person who complains of human rights violations involved anywhere in the world. Second, the exception in H.R. 934 recognizes that, where the domestic courts of the foreign state in which a covered injury occurs provide an adequate and effective remedy, the aggrieved person, although a U.S. citizen, must pursue that remedy. The extension of extraterritorial jurisdiction contemplated should be limited to cases where a new forum is needed, not merely convenient.

In fact, the coverage attempted by S. 825 is too broad even with these important limitations, and could undermine its legitimate purposes. The acts that are the subject of H.R. 934—torture, extra-judicial killing and genocide—are clearly defined and condemned in several international instruments that have nearly universal support among states. No state claims a right to torture or summarily execute the citizens of another state. S. 825, however, attempts to provide a forum to American citizens who are the victims of "international terrorism," a term subject to intense debate and conflicting interpretation. In view of the absence of consensus in this area, international law provides no support for asserting the jurisdiction of U.S. courts against a foreign state in cases involving allegations of an offense so vague and politically charged as "international terrorism." Moreover, an attempt to assert jurisdiction in such cases could subject the United States to suit in foreign courts for conduct that it considers to be wholly lawful in character.

No need exists for incorporating so broad and politically charged a basis for jurisdiction. Many of the most serious cases that S. 825 seeks to redress would be covered by the widely accepted definitions of torture and extra-judicial killing contained in H.R. 934. The most glaring exception involves acts of hostage-taking, but that conduct could also be covered in the bill by adding hostage-taking to the list of international delicts for which a foreign state could be subjected to suit in U.S. courts. The statute should be revised accordingly.

Another, even more important revision should be made, in order to enable states that differ on the adequacy of an existing remedy to agree to an international forum. It seems safe to predict that no state will accept the proposition that its remedies are inadequate, and many foreign states will take offense at the proposition that they must litigate charges against them in the courts of the nation whose citizens make those charges. The consequences of allowing American citizens to pursue such claims in U.S. courts without first exhausting more traditional options could adversely affect U.S. foreign policy interests.

The way to respond to these concerns is to require the U.S. citizen who sues in our federal courts to accept adjudication of his or her claim before a neutral and fair international tribunal, if the other nations involved is prepared to do so. The International Court of Justice and other existing institutions could readily provide an adequate international remedy for the internationally recognized offenses to be covered by appropriate legislation. Where a foreign state is found both to refuse an adequate domestic remedy, and in addition to refuse to agree to adjudicate or arbitrate the dispute in accordance with one of several available forms of dispute resolution, the U.S. will be in a far stronger position internationally to provide a domestic remedy, and the foreign state will be in a much weaker position to object.

My experience in the *Letelier* case is particularly instructive in this regard. After years of attempting to force Chile to respond to civil suits brought against it in the U.S., we decided to try to resolve the dispute by proposing an international arbitration under a treaty we had with Chile that one had to strain to apply. Chile responded positively to this proposal. While the Chilean Government was unprepared to subject itself to the jurisdiction of the U.S. courts, it was prepared to accept an international arbitration with binding results. The U.S. should similarly be prepared to deal with such claims in some recognized tribunal or through some widely accepted arbitral procedure.

Like the claimants in *Letelier,* other victims of human rights abuses can, of course, petition the Department of State to espouse their claims. Unfortunately, however, for most American citizens whose human rights have been abused by a foreign state, espousal is an inadequate option. One of the reasons that the FSIA was enacted in 1976 was that, owing to the diplomatic pressures that are brought to bear by foreign states, the Department cannot be relied upon to make sovereign immunity decisions "on purely legal grounds and under procedures that insure due process." Similarly, the Department's decision with respect to espousal is likely to be influenced, not only by the merits of the case, but by the Department's concern

for offending a foreign state and creating a potential irritant in its dealings with that state. This is particularly likely to occur where the claimant alleges that espousal is necessary because local remedies in the state that is alleged to have injured him are ineffective and unavailable. My firm's client, Scott J. Nelson, has waited over nine years for a decision as to the espousal of his claim of torture against Saudi Arabia.

Our courts, on the other hand, are not subject to the same pressures as the State Department. They have long and routinely examined the effectiveness of foreign judicial remedies in the context of motions to dismiss based on the doctrine of *forum non conveniens.* Moreover, the exhaustion of remedies requirement embodied in this legislation is precisely the same as that which is contained in the Torture Victim Protection Act, which was enacted in 1991 and which provides a remedy against an individual who commits acts of torture, though not against the foreign state which may be responsible for the torturer's conduct.

In the past, the Department has objected to legislation giving U.S. citizens a judicial remedy in U.S. courts for essentially three reasons. First, the Department has asserted that, under the restrictive theory of sovereign immunity, the activities of government law enforcement agencies and their proxies are always sovereign in nature and, hence, entitled to immunity from suit in our courts. Second, the Department has feared that adoption of this legislation would trigger retaliatory lawsuits in which U.S. law enforcement authorities are hauled into the courts of foreign states to answer for their activities. Third, the Department has been concerned that the legislation would lead to unenforceable default judgments against foreign states that refuse to submit themselves to the U.S. judicial system in cases involving allegations of human rights abuses.

The argument that the activities of government law enforcement agencies are necessarily "sovereign" ignores the decisions in *Letelier* and *Liu,* which hold that no state has the discretion to commit acts that violate basic "precepts of humanity as recognized in both national and international law." These decisions are consistent with a uniform body of case law holding that torture and other universally recognized abuses of human rights cannot be characterized as official acts of state in view of the extraordinary degree of codification and consensus condemning such acts as violations of international law. The Department has never taken the position that the decisions in *Letelier* and *Liu* are incorrect or that the principles that they espouse are inconsistent with U.S. obligations under international law. If such acts are not regarded as protected sovereign acts when committed in the United States, they cannot consistently be regarded as "sovereign"—and therefore immune—when committed abroad.

The fear that adoption of this legislation would result in U.S. law enforcement agencies being hauled into foreign courts to account for their actions is unfounded. Following the decision in *Letelier,* foreign states have been subject to suit in the United States for human rights abuses perpetrated by their intelligence and law enforcement agencies in this country. Yet, I am unaware of a single case in which an action alleging torture, assassination, or any similar abuse has been brought against the CIA, the DEA, or any other agency of the U.S. Government based on its activities abroad. Even less reason exists to fear that the U.S. law enforcement agencies will be hauled into foreign courts based on their maltreatment of foreign nationals on American soil. Few such cases occur in the U.S., and adequate and effective remedies exist for foreigners who might claim to have suffered such violations. While the danger of a retaliatory action is real, it seems insubstantial and well worth accepting as the price for ensuring a fair forum for the egregious acts involved, whether they occur on foreign or American soil.

The concern that this legislation will result in unenforceable default judgments is equally unpersuasive. When the FSIA was adopted in 1976, we faced a far more substantial risk that Soviet bloc and other countries that adhered to the absolute theory of sovereign immunity would not appear in our courts. Eventually, however, we were able to persuade those countries that it was in their interest to appear. In most instances, therefore, a foreign state will appear and assert its rights, rather than exposing its property to attachment. Even if a foreign state chooses not to appear, the imposition of a default judgment will create pressure on it to settle the dispute. In my experience, while a judgment may be disregarded when it is rendered, the issue is eventually addressed and some form of relief is obtained.

For the reasons described above, therefore, and with limitations which I believe are essential, I support the proposed legislation. And I thank you, Mr. Chairman, and this Committee, for inviting me to testify.

SUMMARY

Mr. Sofaer supports legislation that would amend the FSIA by making an exception to sovereign immunity in certain cases in which torture and other egregious violations of human rights are perpetrated against American citizens. He believes that such legislation is necessary to ensure that when such violations occur, Americans are not denied the right to a fair hearing.

Mr. Sofaer's support for this legislation is premised on the inclusion of certain safeguards that would ensure its consistency with international standards and minimize the risk of causing offense to foreign states. First, the legislation should apply only to conduct that is clearly defined and universally condemned by the international community. He, therefore, opposes inclusion of an offense so vague and politically charged as "international terrorism" and would propose instead that the amendment cover acts of hostage-taking, in addition to torture, extra-judicial killing and genocide. Second, the legislation should require that an American citizen pursue his claim in the domestic courts of the foreign state in which the injury occurred whenever those courts provide an adequate and effective remedy. Finally, the legislation should give American citizens a remedy in U.S. courts only when the foreign state refuses to adjudicate or arbitrate the dispute before a neutral international tribunal.

In Mr. Sofaer's view, legislation incorporating these safeguards would represent a prudent expansion of existing law that will safeguard the rights of American citizens. He points out that the FSIA already strips a foreign state of immunity from suit in cases involving gross abuses of human rights perpetrated on U.S. territory. If such acts are not regarded as protected sovereign acts when committed in the United States, they cannot consistently be regarded as "sovereign"—and hence immune—when committed abroad. Moreover, in view of the fundamental and universal nature of the prohibition against torture and similar abuses, the normal rules against extra-territorial assertions of jurisdiction are not applicable.

Mr. Sofaer also believes that the fear that this legislation will result in U.S. law enforcement agencies being hauled into foreign courts to account for their actions is unfounded. Though foreign states are currently subject to suit in the United States for human rights abuses perpetrated by their agents in this country, no actions alleging torture, assassination or any similar abuse have been brought in foreign courts against the CIA, the DEA or any other agency of the U.S. Government based on their activities abroad. Moreover, allegations by foreign citizens of human rights abuses perpetrated by U.S. law enforcement agencies on U.S. soil are rare and adequate and effective remedies are available in this country when such abuses do occur.

Senator HEFLIN. Mr. Sofaer, your recommendation is that the designation of victims of international terrorism is too subjective and should be removed and be more specific, like "hostages" and specific types of terrorism that was inflicted on them. Is that your view?

Mr. SOFAER. Yes, it is. Chairman Mazzoli testified earlier today, and his legislation has that in it and I commend him. I commend Senator Specter and this committee for all the work being done, but I think on that particular issue the House bill is the better version.

Senator HEFLIN. Now, you have also stated that Americans wishing to pursue a claim under this proposal should be required to exhaust all forums provided through international channels, such as the International Court of Justice. How realistic is that proposal? Moreover, how important is it for the Foreign Sovereign Immunities Act to be consistent with established international practice, and if it is important, will the proposed legislation meet this criteria?

Mr. SOFAER. No, I don't condition my support on the exhaustion of international remedies such as the ICJ. I do condition it on a finding by the Federal court involved or the international tribunal involved, if one is convened, that there was an exhaustion of an

available and effective remedy in a foreign country, as it now provides.

I would add to that permission, in effect, for the foreign country involved to say to the United States, to say to the plaintiff, instead of going to your courts, we will agree to an international hearing on this matter; each of us will appoint an arbitrator, they will pick a neutral, and we will agree under the established rules of international adjudication to have a hearing and to pay any judgment rendered.

I think that is how we got—in fact, I have no doubt that is how we got the Chilean government to agree to adjudicate the *Letelier* case. They were not willing to come here and adjudicate that claim in the Federal courts, but the Chilean government—and not just the new government, Senator, but the old government—this was agreed to by the predemocratic government in Chile. As soon as we came up with the idea of using the 1914 Treaty on the Settlement of Disputes as a vehicle for doing this, setting up an international tribunal, they accepted it.

We didn't have to run in their faces the use of the Federal courts in the United States, and I don't think we have to in this legislation. If a foreign government is prepared to submit itself to an international tribunal, I say we ought to be ready to accept that as well. In fact, this principle undercuts many of the objections raised by the U.S. Government representatives here because we would not have to go to a foreign court and subject our people to an adjudication there. We could insist on an international tribunal, as well, to have claims lodged against the Government of the United States adjudicated.

So I think it would be a very good way to break this logjam that is created around the world over these heinous activities. It is incredible to me, Senator, that the legal establishment of this world has gone about its business and established exceptions to foreign sovereign immunity for commercial activities, which I fully support, and has been so reluctant and incapable of establishing meaningful remedies for heinous human rights violations.

I say that because I think it is related to this question of where will the trial occur. If we come to grips with the need to allow an international tribunal in cases like this, I think we will have overcome a large part of the reticence that seems to exist both within this Government and in foreign governments over this issue.

Senator HEFLIN. Thank you. We appreciate your testimony. Each of you gave very moving testimony and our sympathy goes out to each of you that has suffered, as well as your friends that suffered. Thank you.

We have a statement from Senator Thurmond that we will include in the record.

[The prepared statement of Senator Strom Thurmond follows:]

PREPARED STATEMENT OF SENATOR STROM THURMOND

MR. CHAIRMAN: The hearing this morning focuses on S. 825, which would amend the Foreign Sovereign Immunities Act to provide jurisdiction over foreign countries in certain cases involving acts of international terrorism. Senator Specter is to be commended for his effort to provide recourse to those who suffer from international terrorism.

There is no doubt that international terrorism is a scourge of modern society. Terrorism is cowardly conduct which targets innocent civilians for undeserved harm or death. Clearly, we should give serious consideration to any measure which would be effective in reducing international terrorism. We should also seek to provide redress whenever possible for Americans who are improperly injured by foreign countries.

On the other hand, we must be prudent and realistic in considering legislation if it is unlikely to be effective in achieving the desired benefits. We must recognize that this legislation, even if adopted, cannot force other countries to appear in our courts. Thus, private actions may not be as effective to provide redress to injured Americans or to deter international terrorism as we would wish. Further, while this legislation is aimed at a small number of nations, we also must be cognizant of the impact it may have on our relations with the rest of the international community. We live in a world of sovereign nations and any standard of jurisdiction that the United States applies to foreign countries is likely to be applied to us in return. Therefore, it may be counterproductive to try to assert our jurisdiction over foreign nations beyond the limit that we can hope to achieve in practice.

Mr. Chairman, I look forward to hearing from the witnesses this morning to clarify these issues, and thank each of them for their time and effort in being here. In particular, we should recognize the individuals appearing before us who have suffered at the hands of foreign governments for their bravery.

Senator HEFLIN. We are adjourned.

[Whereupon, at 11:45 a.m., the subcommittee was adjourned.]

APPENDIX

Questions and Answers

Questions From the Subcommittee on Courts and Administrative Practices to Jamison Borek

Question 1. Could you both please discuss your views on whether private litigation as permitted by S. 825 would provide any deterrence to international terrorism? Would this legislation send a helpful signal to foreign countries which are involved in international terrorism?

Answer 1. Terrorists and their sponsors are typically motivated by political causes or a desire for retaliation against their targets. They clearly recognize the possibility of diplomatic, criminal justice, or even military responses to their actions. Yet they are still willing to undertake terrorist attacks. Consequently, we are skeptical that concern about private litigation in the United States would be a meaningful deterrent to terrorism.

For the reasons detailed in the testimony, it is the view of the Department of State that, regardless of any hypothetical effects such legislation might have in selected cases, counterterrorism policy and reactions to international terrorist threats and incidents are best coordinated in a unified manner by the federal government.

Question 2. Could you both please discuss your views on how effective S. 825 would be, if it became law, in providing actual recoveries to injured American plaintiffs?

Answer 2. We do not believe that this legislation would provide an effective remedy for American plaintiffs. It is likely that foreign states would refuse to participate in many such cases, giving rise to default judgments that would be difficult or impossible to enforce. States that sponsor terrorism are not likely to have significant assets in the United States that could be used to satisfy judgments, nor could it be expected that judgments obtained under such legislation could be enforced abroad.

Questions From the Subcommittee on Courts and Administrative Practice to Abraham D. Sofaer

Question 1. Mr. Sofaer, I understand that you would support a provision which gives jurisdiction in courts in the United States only when foreign countries do not provide adequate remedies for American citizens who have been injured. In your view, who would determine whether a foreign remedy is adequate?

Answer 1. In my view, the courts of the United States are well equipped to determine whether the courts of a foreign state provide adequate and available remedies for American citizens who have been injured in those states. This is an inquiry that our courts have routinely made in the context of motions to dismiss based on the doctrine of *forum non conveniens.* Recognizing the competence of our courts to make determinations of this nature, the Congress included an exhaustion of remedies provision when it enacted the Torture Victim Protection Act of 1991 (PL 102–256), which is identical to that contained in H.R. 934.

While the courts can be counted upon to resolve the adequacy of remedies issue in a manner that accords with due process, Congress has recognized that the State

Department cannot be trusted to the same degree. The State Department is under constant pressure from foreign states and may be reluctant to risk causing any offense by making a determination that it would be futile to pursue local remedies in their courts. It was because of the State Department's inability to make sovereign immunity determinations "on purely legal grounds and under procedures that insure due process" that Congress transferred the immunity determination to the courts when it adopted the FSIA in 1976.

Question 2. Mr. Sofaer, in your view is "torture" likely to be a broader category than "international terrorism.

Answer 2. "Torture" is a much narrower category than "international terrorism"; it is also much more easily defined and widely accepted than the latter phrase. The term "torture" is defined in the Torture Victim Protection Act of 1991 as follows:

> [T]orture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual, or for any reason based on discrimination of any kind * * *.

This definition of torture derives from the United Nations Torture Convention, which has received the endorsement of a wide segment of the international community. Moreover, the experience of courts both in the United States and abroad has demonstrated that this definition is manageable and confined.

In contrast, the term "international terrorism" is politically charged and its definition is subject to intense debate and little agreement among states. Admittedly, the definition of "international terrorism" in S. 825 is reasonably narrow. Nevertheless, in view of the absence of consensus in this area, if that phrase is inserted in the legislation being considered, the United States could find itself subject to suit in foreign courts for conduct that it considers to be wholly lawful in character.

Question 3. Mr. Sofaer, how effective do you think S. 825 would be, if it became law, in providing actual recoveries to injured American plaintiffs?

Answer 3. For the reasons specified in my June 21, 1994 testimony, it is essential that any legislation that seeks to amend the FSIA provide a remedy to American victims of state sponsored torture and other egregious abuses of human rights incorporate adequate safeguards. A carefully drawn amendment would lead to actual recoveries in a number of cases for several reasons. First, in most cases foreign states will agree to international arbitration or to a settlement rather than litigating meritorious human rights claims in U.S. courts. Second, experience demonstrates that, when foreign states do litigate in U.S. courts, they generally pay the judgments rendered against them. Recovery will, of course, be most difficult in those cases in which a foreign state defaults. In some such cases, however, the foreign state may have non-diplomatic assets in the United States against which a plaintiff can execute. In all cases, the default judgment will be a thorn in the side of the foreign state that will increase pressure to resolve the matter.

QUESTIONS FROM SENATOR THURMOND TO THE U.S. DEPARTMENT OF JUSTICE

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, September 30, 1994.

Hon. HOWELL HEFLIN,
Chairman, Subcommittee on Courts and Administrative Practice,
Committee on the Judiciary, U.S. Senate,
Washington, DC.

DEAR MR. CHAIRMAN: Thank you for your letter of July 20, 1994, regarding the testimony of Stuart Schiffer before the Senate Judiciary Subcommittee on Courts and Administrative Practice regarding S. 825, as introduced, a bill to amend the Foreign Sovereign Immunities Act. Your letter also requests a response to some additional questions submitted by Senator Thurmond. We appreciate this opportunity to present the views of the Department of Justice on S. 825, as introduced, both at the Subcommittee hearing and in response to Senator Thurmond's questions.

The Department of Justice is totally committed to the fight against international terrorism by all effective means. Senator Thurmond's questions go directly to the core issue of the effectiveness of S. 825 as a remedy to victims of state-sponsored

terrorism. In our view, S. 825, by extending the jurisdiction of U.S. courts over suits alleging deliberate wrongdoing by foreign states, and by authorizing prejudgment attachment of foreign state property in such suits, would not be an effective remedy for state-sponsored terrorism because it goes well beyond the current international consensus regarding jurisdiction over foreign states in tort suits. In response to suits proceeding under S. 825, foreign states are likely not to appear in U.S. court, and not to honor judgments rendered against them. Foreign states which sponsor international terrorism also are unlikely to have significant assets in the United States which might be attached. Conversely, we may be exposed to reciprocal treatment by foreign states for our deliberate policies which may be unpalatable abroad.

We wish to respond to Senator Thurmond's questions as follows:

Question 1. Could you please discuss your views on whether private litigation as permitted by S. 825 would provide any deterrence to international terrorism? Would this legislation send a helpful signal to foreign countries which are involved in international terrorism?

Answer 1. We believe there are more effective deterrents to international terrorism than private litigation. These include criminal prosecution of individuals who commit acts of terrorism and economic sanctions against countries designated as state sponsors of terrorism. Moreover, because of the sensitivity of such suits, we believe that foreign states will be reluctant to appear to defend themselves in this context.

Question 2. Could you please discuss your views on how effective S. 825 would be if it became law, in providing actual recoveries to injured American plaintiffs?

Answer 2. We do not believe that S. 825 would be effective in providing actual recoveries to American plaintiffs. As noted above, foreign states are reluctant to enter the courts of other countries to defend themselves against charges of violations of law stemming from conduct within their own borders. This makes the tort area one with particularly high potential for default judgments, and the problems associated with them. In addition, states which sponsor terrorism are unlikely to have assets in the United States to satisfy judgments pursuant to S. 825. Furthermore, because S. 825 departs from the current international consensus, it is unlikely that judgments based on it will be recognized and enforced in foreign jurisdictions, or that terrorist states would have significant assets in any jurisdiction which might honor our judgments under S. 825. Thus, we view S. 825 as providing little chance of realistic relief to U.S. plaintiffs while it exposes the United States to adverse-consequences overseas.

Question 3. You raise a concern in your written testimony about exercising prejudgment attachment on foreign governments' commercial property, because of the reciprocal exposure of the United States. What alternative provision, if any, would you suggest?

Answer 3. We do not see any practicable alternatives which fulfill the same functions as prejudgment attachment. As outlined in our testimony, enlarging the prejudgment attachment limitations in the Act poses foreign relations concerns and invites reciprocal treatment by foreign states where United States assets are located abroad. The United States, which has more overseas assets than any other country, is most exposed in this regard. We are wary that, while well-intentioned, S. 825 will lead to the entanglement in judicial proceedings of United States property overseas, while creating little real benefit to U.S. plaintiffs because state sponsors of terrorism will have little or no property which might be subject to attachment in this country.

I hope this letter is responsive to Senator Thurmond's questions. I am happy to respond further to any additional questions or thoughts that you, or other members of the Subcommittee, may have on this subject.

Sincerely,

SHEILA F. ANTHONY,
Assistant Attorney General.

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MARK S. ZAID
OF COUNSEL

June 16, 1994

Senator Howell Heflin
Subcommittee on Courts & Administrative Practice
U.S. Senate Judiciary Committee
223 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Heflin:

We are grateful for the opportunity to submit our views for the written record of the Subcommittee on Courts & Administrative Practice of the Senate Judiciary Committee on the proposed amendments to the Foreign Sovereign Immunities Act of 1976 (hereinafter "FSIA"), 28 U.S.C. §§ 1602-1611, addressed by S.825 and H.R.934. Our interest in this matter stems as lawyers for the family of a victim of what can only be categorized as an atrocious, inhumane act: the terrorist bombing of Pan Am Flight 103 in which 270 innocent men, women and children, including 189 Americans, were killed.

International law, as advanced by the United States and the international community for over thirty years, forbids and condemns attacks upon, hijacking of, or the deliberate targeting and destruction of, civilian aircraft, no matter what the underlying reason.[1] In order to seek justice and obtain accountability, we have filed on behalf of our client, Bruce Smith, the first American civil suit against the government of Libya for the December 21, 1988 bombing of Pan Am Flight 103.[2]

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[1]For example, see The Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), 20 U.S.T. 2941, T.I.A.S. No. 6768 (1963); The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, (Montreal Convention) 24 U.S.T. 564, T.I.A.S. No. 7570 (1971).

[2]Smith v. Libya et al., Civil Action No. 93-2568 (D.D.C. December 15, 1993)(Sporkin, J.). The action also names as defendants: the Libyan External Security Organization, Libyan Arab Airlines, and the two indicted suspects, Abdel Basset Ali

For the benefit of the record, Attachment "A" contains several newspaper articles pertaining to our case and surrounding issues. Unfortunately, in pursuing this quest, we are hindered, rather than helped, by the arcane and anachronistic concepts that predominantly overwhelm the FSIA.

We, therefore, welcome this opportunity for Congress to revise the FSIA so that justice can be served in our case and in the cases of other families affected by the wanton destruction carried out by state sponsors of terrorism in violation of international law. To go over basics, because basics are what this revision is all about, justice requires in cases such as Pan Am Flight 103 the punishment of the perpetrator. But criminal punishment -- assuming it is a realistic prospect -- is by no means the sole remedy. Nor is it, in this particular case for that matter, a means by which all responsible individuals could be punished for terrorist acts committed against Americans and their family members.

One only has to review the captions in the criminal indictments filed in the United States and United Kingdom to realize that the only named defendants are two Libyan nationals. Yet, by the factual allegations outlined in these very same indictments the government of Libya, and several named high level officials, allegedly employed these individuals as intelligence agents and purposefully directed their actions.

In the case of Pan Am Flight 103 the murder trail, as repeatedly affirmed by the American and British governments, leads straight to the Libyan government leadership, including Colonel Mu'ammar al-Qadhafi himself. But, because it is accepted international practice that states and their leaders are generally immune from criminal proceedings in other countries, Libya's leadership has been able to, and likely will, evade punishment. Justice will not be accomplished absent a total military defeat of Libya which would then create an opportunity for a trial such as those held at Nuremburg and Tokyo following the Second World War. The fact remains that it is impossible given our current state system to haul a foreign government or its leaders into a United States court for the purpose of criminal punishment.

There is, however, an important alternative which can serve as an effective remedy. In the case of terrorist states, the prospect of a substantial civil judgment should be seen as a twin pillar to criminal prosecution. Governments or their officials have, in the

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Al-Megrahi and Lamen Khalifa Fhimah. Mr. Smith's wife, Ingrid, perished in the bombing.

past, been held accountable in our domestic courtrooms for civil damages resulting from acts of torture or massive deprivation of human rights.[3] At least one pending action seeks civil remedies based on circumstances that fall within the category of crimes against humanity.[4] Still, especially in the area of human rights, victories under the FSIA have been rare and almost impossible to obtain due to the increasingly constrictive interpretation of the FSIA given by the American judiciary.

Thus, for example, in the case of Saudia Arabia v. Nelson[5] the United States Supreme Court held that even though the government of Saudia Arabia, through its police officials, may have engaged in acts of torture against an American citizen -- after that citizen was induced to travel to and take employment in Saudia Arabia by virtue of actions that that government took in recruiting him, through advertisements in American newspapers -- the government of Saudia Arabia was nevertheless held to be beyond the reach of United States law.

Even in the rare instance where a state could be held accountable under the present interpretation of the FSIA by a United

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[3]See generally Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980)(Paraguayan official can be held liable for deliberate torture perpetrated under the color of official authority); Forti v. Suarez-Mason, 672 F.Supp. 1531 (N.D.Cal. 1987)(Allegations of murder and torture against former Argentinean general allowed to proceed under Alien Tort Claims Statute); Von Dardel v. Union of Soviet Socialist Republics, 623 F.Supp. 246 (D.D.C. 1985)(Soviet Union denied immunity for violation of diplomatic immunity arising from arrest, imprisonment and possible death of Swedish diplomat Raoul Wallenberg); Letelier v. Republic of Chile, 488 F.Supp. 665 (D.D.C. 1980)(Chilean government does not possess immunity for government executed assassination that occurred in the United States).

[4]Princz v. The Federal Republic of Germany,813 F.Supp 22 (D.D.C. 1992)(American nazi concentration camp survivor seeking damages for nazi atrocities committed during World War Two).

[5]113 S.Ct. 1471 (1993). Although the claim was based on Nelson's injuries arising from his alleged detention and torture, due to the restrictive language of the FSIA Nelson was forced to bring suit under the "commercial activity" exception of § 1605 (a)(2) and not the "non-commercial tort" exception of § 1605 (a)(5). H.R.934 would allow actions such as Nelsons to proceed to the merits.

States court for an act of state sponsored terrorism, it is difficult if not unlikely that collection of the judgement will ever occur. The most telling example is that of the widow of former Chilean diplomat Orlando Letelier and her unsuccessful attempt to attach Chilean state property to satisfy a judgment obtained against Chile for the 1976 assassination of her husband.[6] That case amply demonstrates the dilemma and illustrates the need to adopt the language proposed by the present amendments with respect to execution of judgments. After all, what benefit is the prospect of achieving civil accountability against a state if an aggrieved plaintiff can not execute upon the verdict?

S.825 and H.R.934 are designed to overcome these and other problems. Most importantly, they would enable American citizens, or their survivors, to seek civil damages from states responsible for the most blatant contravention of internationally guaranteed human rights -- no matter where the act occurred. Furthermore, the amendments would ensure those rights are more than window dressing but, in fact, substantive and actionable rights.

The matter of Pan Am Flight 103 is a case in point. Although it is not essential for the purposes of our suit that the FSIA be amended, in so far as we allege that Pan Am Flight 103, as an American flagship aircarrier, was -- for all intents and purposes under American law -- part of United States territory (the Congress may, depending upon the language adopted in its final revision, wish to avail itself of the opportunity to more clearly define the definitional parameters as to what constitutes United States territory under the FSIA[7]), we nevertheless would welcome the

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[6] Letelier v. The Republic of Chile, 748 F.2d 790 (2nd Cir. 1984)(Plaintiffs not permitted to attach assets of Chilean state airlines to satisfy judgment obtained against government for assassination of former Chilean diplomat). The Court explicitly recognized the true problem as it opined that "Congress did in fact create a right without a remedy." Id. at 798.

[7] It would be helpful if the Congress clarified the meaning of the phrase "in the United States" as it is used in § 1605 (a)(5)(non-commercial tort exception). The Supreme Court, while noting the different territorial limitations imposed by § 1605 (a)(2) and (a)(5), passed on the opportunity in Argentine Republic v. Amerada Hess Shipping Corp., 109 S.Ct. 683 (1989). For example, at the very least, the FSIA should be made to comport with the territorial language of the Antiterrorism Act of 1991, 18 U.S.C. §§ 2333 et seq., which was expanded to include

proposed amendments in order to enable ourselves and other families of victims to have a more clearcut basis for suit. There is no rational basis for a distinction between a case in which an American is killed by a terrorist attack while working at his desktop computer in the World Trade Center from that in which an American is killed while working on a laptop computer in an American aircraft 31,000 feet above the ground over Europe or elsewhere.

We understand that the Department of State has, as they have in the past, expressed opposition to these amendments. Their reasoning stems primarily out of a perceived fear that the dictates of reciprocity might create a situation whereby American officials would be increasingly brought to account in foreign courts, including that of Libya or other terrorist states. There is, of course, much to be said for symmetry in the law. But it can be taken to an excess.

Here symmetry -- and by that we mean the equal application of the law -- is assured in so far as whatever system would bring officials to account would have to be acknowledged as one capable of fair, impartial judgments by an independent judiciary. There are few, if any, jurists in the world today who would be willing to subscribe to the idea that Libya's courts, or those courts of states that would be affected by S.825, would meet that standard. For that reason, the much touted reciprocity arguments pertains more to abstractions than reality. Its only real effect is to prevent the achievement of justice -- that is, holding the ultimate perpetrator of atrocities like Pan Am Flight 103 to account by methods that are within our means, namely civil damages.

The FSIA must also be allowed to evolve with the transformation of international law and not continue to be interpreted merely by its legislative history. By its very nature, customary international law is transitory and the FSIA must be allowed to expand with the

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the Special Maritime or Territorial Jurisdiction of the United States, 18 U.S.C. § 7.

In order to afford greater protection to American citizens overseas, this Congress may also wish to review whether the grounds of an American Embassy should constitute United States territory for the basis of a civil action against foreign states filed under this proposed legislation. The courts have clearly decided otherwise as illustrated by the string of cases arising from the Iranian hostage situation of 1979-80. See Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C.Cir. 1984); McKeel v. Islamic Republic of Iran, 722 F.2d 582 (9th Cir. 1983); Ledgerwood v. Islamic Republic of Iran, 617 F.Supp. 311 (D.D.C. 1985).

development of the norms of customary international law held to beoutside the scope of a state's claim of immunity. The Ninth Circuit stated it aptly: "if violations of jus cogens [i.e., slavery, torture, piracy, genocide, attacks on civil aviation] committed outside the United States are to be exceptions to immunity, Congress must make them so."*

Since the adoption of the FSIA in 1976, amendments to the FSIA have been regularly proposed and defeated on the recommendations of the Department of State. In an era in which innocent Americans are targeted by terrorists specifically because they are Americans, Congress must act to afford the victims and their families some manner of recourse in which justice and accountability can be achieved. To fail to do so twice punishes those victimized; first by the terrorists who caused them harm, and secondly by the country that, after having failed to protect them from harm, precluded them from the opportunity to seek punishment of the perpetrators, often by the only means available in these situations: civil damages. Our views on the general subject of civil remedies against terrorist states and on the pending bills have been more fully presented in our speeches and writings, examples of which are submitted herein for your review as Attachments "B" and "C" respectfully.

We thank you for your attention to this most important subject and urge you to amend the FSIA to allow Americans or their surviving family members to hold foreign states civilly liable for their terrorist acts committed abroad. Should the Committee wish for us to expound further on any of the views presented in this letter or the attachments, please do not hesitate to contact us at (202) 785-9281.

Sincerely,

Allan Gerson
Professor of International Law
and Transactions,
The George Mason University

Mark S. Zaid
Member of the N.Y.,
C.T., and D.C. bars

Attachments

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*Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 719 (9th Cir. 1992).

ATTACHMENT A.1

Syracuse Post Standard

Wednesday, December 15, 1993

Libya Sued Over Flight 103 Bombing

■ A victim's husband is demanding $15 million, to prove state-sponsored terrorism is "too expensive."

By MATTHEW COX
Albany Bureau

A former Pan Am pilot whose wife was killed in the bombing of Flight 103 is suing Libya for $15 million for its alleged role in the 1988 terrorist attack over Lockerbie, Scotland.

The lawsuit could result in a civil trial on many of the same issues spelled out in a 1991 criminal indictment.

"Libya hasn't been penalized for sponsoring the attack," said Bruce M. Smith, now a pilot with Delta Airlines. "This gives us the chance to have a trial where we can determine, in the eyes of the world, yes, they did it; yes, they're guilty."

Smith's lawsuit, expected to be filed today in U.S. District Court in Wash

(See MAN, Page B-2)

Man Sues Libya over Bombing

(MAN, from Page B-1)

ington, D.C., names as defendants the Libyan government; its intelligence agency; Libyan Arab Airlines, the government-run airline whose offices in Malta allegedly were used to store the bomb's explosives; and two Libyan intelligence agents accused of carrying out the attack.

A spokesman for the Libyan mission tn the United Nations did not immediately return a telephone call seeking comment.

Libya has refused to produce the two agents for trial, and the UN's effort to force their surrender through sanctions has been unsuccessful.

"We're at an impasse," said Mark S. Zaid, a Washington, D.C., lawyer who is handling the case along with Allan Gerson, former chief counsel to the U.S. mission to the UN. "This is one way to move forward. This is one way to achieve accountabiiity and to receive compensation."

The Dec. 21, 1988, bombing killed 270 people, including 35 students enrolled in a Syracuse University study abroad program and five others with ties to Central New York.

Smith's suit makes many of the same allegations outlined in the U.S. Department of Justice's November 1991 indictment accusing Libya of masterminding the attack. It alleges that Libyan leader Muammar Qaddafi ordered the bombing, and that two Libyan agents, Abdel Basset Ali al-Megrahi and Lamen Khalifa Fhimah, used their connections to Libyan Arab Airlines to carry it out.

Smith filed a similar lawsuit against Libya in Edinburgh, Scotland, about seven weeks ago, Zaid said.

Smith, 57, is one of a relatively small number of family members who accepted $100,000 from Pan Am's insurance carrier to settle potential lawsuits against the airline. Another 225 families sued Pan Am and won a verdict that said the airline's poor security contributed to the attack. The airline is appealing.

Smith said he used his $100,000 to fund a successful lobbying campaign in Washington, D.C., aimed at establishing an anti-terrorism reward program. The program, administered by the State Department, offers up to $4 million for information that helps track down airline terrorists.

Smith's wife, Ingrid, died while traveling from the couple's home in England to New York, where the 31-year-old podiatrist planned to meet her husband for Christmas. Today, Smith lives in a suburb of Daytona Beach, Fla.

Smith said he hopes to win an award against Qaddafi's government that is large enough to convince other countries not to engage in state-sponsored terrorism.

"I want to teach any country that uses terrorism as a way of influencing foreign policy that it's too expensive," Smith said. "They might enjoy it, but they can't afford it."

ATTACHMENT A.2

B16 THE WALL STREET JOURNAL THURSDAY, DECEMBER 16, 1993

LAW

Pan Am Sues Libya

Pan American World Airways Inc. and a former Pan Am pilot filed separate civil suits seeking to hold the government of Libya liable for damages in connection with the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland.

The lawsuits are the first against Libya stemming from the disaster, which killed 270 people. But the legal actions face enormous legal and political hurdles. Some families of crash victims also said they were concerned that the cases would divert attention from efforts to recover damages directly from Pan Am in suits currently pending in New York.

Pan Am's suit, which was filed in Edinburgh, Scotland, seeks $375 million for loss of business and for the value of the lost aircraft. In Rockleigh, N.J., Gregory Buhler, a lawyer for Pan Am, which ceased flight operations and sought federal bankruptcy-law protection in 1991, said the suit was part of the normal course of winding up the company's affairs for creditors.

Bruce Smith, a former Pan Am pilot, whose wife died in the crash, filed a separate lawsuit in U.S. District Court in Washington, seeking $15 million. Mr. Smith previously filed a similar action in Scotland.

Under the doctrine of sovereign immunity, foreign nations generally can't be sued in U.S. courts, and the law is believed to be only slightly more plaintiff-friendly in Scotland. The cases are likely to require the cooperation and support of U.S. and United Kingdom authorities, who so far have focused on pursuing sanctions and criminal charges against the Libyans, rather than civil relief.

"This raises more questions with me than it answers," said Lee Kreindler, a lawyer who is currently suing Pan Am in New York on behalf of a number of Pan Am 103 victims' families. "None of the families I know of anywhere support what they are trying to do." Mr. Kreindler said of Mr. Smith's suit. Libya has made a number of recent overtures about paying money to victims' families, but many have rejected the idea of accepting any money without a resolution of the criminal charges.

Allan Gerson, a lawyer for Mr. Smith, said he believes foreign nations should not be immune from suits in cases of alleged terrorism, and he said pursuing damages was appropriate while the criminal case proceeded. He added, "I believe the issue of compensation can stand apart from the issue of punishment."

ATTACHMENT A.3

International Herald Tribune

PUBLISHED WITH THE NEW YORK TIMES AND THE WASHINGTON POST

Edited in Paris Wednesday, January 12, 1994 Printed in New York

LETTERS TO THE EDITOR

Taking Libya to Trial

It has been more than five years since the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland, an act of premeditated murder that caused the deaths of 270 persons. But despite exhaustive investigations we remain no closer to solving that crime than we were in November 1991, when the United States and Britain announced the indictment of two Libyan intelligence officers as the alleged bombers.

Libya continues to defy the United Nations Security Council resolutions calling for it to hand over the agents. And even if prosecution of the two Libyans in an American or British court were possible, it would hardly provide an adequate finale to this tragedy. Such a trial would not be likely to lead to indisputable proof of Libyan complicity. Or the two could plead guilty and avert a trial.

With no proof and no full accounting, sanctions against Libya would be lifted and other state sponsors of terrorism would see the small price they would pay for their acts.

Can anything be done to force Libya's hand, to ensure accountability and the assumption of responsibility? The U.S. government seems convinced that criminal punishment is the sole means of obtaining justice. But there are other paths to justice, including civil damages in a court of law. Indeed, civil damages, pursuant to a civil trial on merits, appears to be the best way, if not a perfect one, to achieve accountability.

A civil suit does not seek to replace the prospect of criminal punishment but to recognize its limitations. Sovereign nations cannot be punished as if they were individuals. They can, however, be deterred from future acts of illegal conduct by being held accountable.

To ensure accountability through a civil suit two hurdles must be overcome. Libya needs to be stripped of any vestige of sovereign immunity that it has under U.S. law. In a ceremony at Arlington National Cemetery on Dec. 21, President Bill Clinton stated that the attack on Pan Am Flight 103 was a deliberate attack on the United States. As such, Libya deserves no protection from a civil suit in a U.S. court. Yet, in the past the U.S. government has joined forces with offender states to protect their right to immunity from civil suit.

The U.S. government would also need to stop refusing to share evidence implicating Libya on the ground that it would compromise the use of such evidence in a criminal prosecution. Today, the prospect of criminal prosecution seems increasingly remote.

Although the evidence presented in the U.S. criminal indictment is said to be conclusive, it fails to name the government of Libya. Only its two alleged agents are named as defendants. A civil trial would remedy that by focusing attention on the government of Libya. And, unlike a criminal trial, it only requires proof of a preponderance of evidence, not the more exacting test — "beyond a reasonable doubt" — used in a criminal trial.

ALLAN GERSON,
MARK S. ZAID,
Washington.

On Dec. 15, the writers filed suit in the U.S. District Court for the District of Columbia against the government of Libya, on behalf of the husband of Ingrid Smith, who died on Pan Am Flight 103.

ATTACHMENT A-4
THE NEW YORK TIMES EDITORIALS/LETTERS MONDAY, APRIL 11, 1994

What Other Choices?

To the Editor:

"Libya Blinks on Lockerbie" (editorial, March 28), suggesting that the United States and Britain accept Libya's offer of a trial at The Hague of two Libyan agents suspected of bombing Pan Am Flight 103 points to a way out of the impasse and the possibility of achieving some measure of accountability.

Unfortunately, the plan, which was widely discussed by the Scottish press last January, has apparently been rejected by British and American officials as unacceptable. A similar plan was presented by the Egyptian Government to every Security Council member, including the United States, last December, and was also rejected.

Does it truly matter where a criminal trial takes place, as long as the presiding court conforms to American or British standards of due process and evidentiary fairness?

Opponents of The Hague plan argue that it is not consistent with United Nations Security Council resolutions that call for surrender of the two named Libyan nationals ostensibly responsible for the bombing, even though there is no extradition treaty between Libya and the United States or Britain.

But justice in such an international stand-off may require modification of positions at the United Nations.

Should the Clinton Administration continue refusing to endorse such plans for a criminal trial outside of the United States or Britain, it would be placing its hopes on less than airtight sanctions and the implicit threat of armed force against Libya. There is another option — support of civil litigation against Libya.

That route might not carry the same ring of vindication as criminal convictions, but it has the advantages of being in the realm of the possible and of providing some measure of relief to the victims and their families.

ALLAN GERSON, MARK S. ZAID
Washington, April 1, 1994

The writers, lawyers for the family of a Pan Am Flight 103 victim, have filed suit against Libya in a Federal court in Washington.

ATTACHMENT B

Remarks by Dr. Allan Gerson
(Professor of International Law and Transactions at
George Mason University)

Panel on "Sovereign Immunity: A Comparative Perspective"

Delivered at the 88th Annual Meeting of the
American Society of International Law

Washington, D.C.
April 8, 1994

Poetry, wrote Nobel Prize winner Czeslaw Milocz, strives to instill order, rhythm and form as antidotes to chaos and nothingness. The Law has no less an aim. In the realm of the law, order and form has as its hallmark accountability. In criminal matters, this means punishment of the offender; in civil matters, it means compensation to the victim or his family. Like Art, the law has to work with the materials -- the particular canvas and paints -- at its disposal. If the artist or the jurist attempts, for example, a composition larger than the canvas, the likely result is not order, rhythm and form, but more disorder.

This is a truth which the law has sometimes ignored, not least in dealing with the subject of war crimes, terrorism and the like. As Professor Frank Newman, former Justice of the Supreme Court of California, put in his discussion yesterday on the establishment of a war crimes tribunal for the former Yugoslavia, "We are witnessing an addiction to criminal punishment. In fact, civil remedies can often be the most effective remedy."

I wish to emphatically endorse that view -- that we can be addicted to criminal penalties at the expense of civil remedies -- in the particular context of Pan Am 103, the airplane which exploded over Lockerbie more than five years ago, the victim of a terror attack which killed all 279 passengers and crew aboard and in the process led, or hastened, the death-knell of America's flagship carrier - Pan American Airlines..

I offer my remarks today not only in my academic capacity, as one who has pondered about the role of punishment as deterrence, or in my hat as an ex-U.S. government official who dealt, sometimes extensively, with international terrorism, but also as an attorney representing a family of a victim of the Pan Am 103/Lockerbie bombing. Although December 21st of last year marked the fifth anniversary of that tragedy, not a single family has, in the interim, seen a single penny in compensation from the government -- Libya -- deemed by the U.S., the U.K., and the U.N. Security Council as most directly responsible for the bombing.

Unlike the other families of victims of Pan Am Flight 103 who chose to file suit exclusively against Pan American Airlines for its gross negligence in bomb detection procedures -- a finding

which has recently been affirmed over a strong dissent by the U.S. Court of Appeals for the 2d Circuit -- the family which I represent viewed and continues to view Pan American Airlines more as victim than as victimizer. With this in mind, my client chose, instead, to bring suit against whom it perceived to be the true villain -- the Government of Libya. On December 15, 1993, my client filed suit in Washington, D.C. against the two alleged Libyan agents named in the United States indictments of November 13, 1991; against Libyan Arab Airlines which ostensibly employed them under cover in Malta where the bomb was allegedly planted, and against the Government of Libya -- their employer.

Obviously, I am not at liberty to discuss any aspects of this currently pending case, in which I am involved as counsel. But, in more general terms, I should like to focus my remarks on the need that this case represents for greater adaptability in permitting civil suits to become a vehicle -- not, surely, an exclusive one -- for addressing state accountability for support of international terrorism.

First, let me offer some personal perspective on the difficulties of criminal prosecution of state-sponsored terrorism. In 1979, while serving as an appellate attorney with the U.S. Department of Justice, I was recruited to help establish its Office of Special Investigations (OSI); an office whose mission was to aid in continuing to bring to justice those deemed responsible for participation in the most horrific form of terrorism -- the genocide of the Holocaust. Because the U.S. Government had no basis for assertion of criminal jurisdiction abroad over the perpetrators, OSI's efforts were tied to civil proceedings aimed at revoking the citizenship of naturalized Americans suspected of having collaborated in such actions.

The gravamen of our complaints was fraudulent procurement of citizenship through misrepresentation of their pasts -- a fact which, if disclosed, would have barred entry into the United States. As these were civil proceedings, the standard of proof was not that of a criminal trial -- beyond a reasonable doubt. Perhaps, OSI, the Government of Israel, and the U.S. Government overlooked or undervalued that fact when, in the case of Ivan Demjanjuk, it was decided, after having stripped him of his U.S. citizenship, to deport him to Israel to stand trial on charges of having run the infamous Treblinka gas chamber. As we know, in the end Demjanjuk was acquitted -- and not out of any lack of zeal by the Government of Israel to gain his conviction. Meeting the criminal standard of proof became simply too difficult an obstacle to surmount.

I dare say that criminal conviction of the two Libyan agents indicted by the U.S. and U.K. may run into equally-formidable

obstacles. This very possibility demands, if justice be our true objective, that we consider alternatives.

In this regard, let me cite a defense similar to that raised by Nazi collaborators which, should there ever be a criminal trial, that these Libyan agents would be likely to raise in their defense -- namely, that they should not be punished for acts that were the product of the times, of "a different era" when selective terrorism appeared to have been condoned by the international community. In a communique of late 1993 by Libya to the U.N. Secretary General, Boutros-Boutros Ghali, on the subject of its role in the Pan Am 103 incident, the government of Libya had this telling remark to make about its support of terrorism: "The role played by the Jamahariya was necessary and normal at that stage and within the context of the international and regional circumstances prevailing at that time. This role was not meant at all to be a departure from the rules set by the international community to govern its dealings and moves".

At "that stage", Libya meant undoubtedly to encompass the fact that the international community had voted not long before the Lockerbie incident to condemn the U.S. legal system for the audacity of extraditing a purported terrorist -- Abu Eain -- to Israel to stand trial for murder. Terrorism, the UN General Assembly declared by an overwhelming majority in response to the U.S. extradition, was to be applauded, not condemned, where conducted in the name of liberation from "alien, colonial and racist" rule.

Can Libya or its agents contend that, in a criminal proceeding, they are being judged by an unfair standard, that even assistance in the destruction of a U.S. civilian airliner was not improper in the context of the politics of that period and that, moreover, it was a political crime? Yes, I believe Libya can be expected to raise this defense directly or indirectly -- and to raise it as much for political as for legal effect.

Surely, Libya could, for example, point to the case of the PLO. The PLO's record reveals a long roster -- certainly no less than that of Libya -- of terrorist acts, acts deliberately committed against innocent Americans as well as Israelis. Yet, as soon as Israel opted for an accommodation with the PLO, the U.S. Administration adopted an attitude of open embrace. Syndicated journalist E.J. Dionne, Jr., heralded -- not atypically. The presence of an array of past U.S. Presidents, Secretaries of State and a good portion of the U.S. Congress to witness the Rabin-Arafat handshake at the White House as a "triumph of politics over principle."

Libya may, indeed, ask why that triumph of politics over principle does not apply to Libya as it applied to the PLO. After

all, as far as I know, the U.S. Government's position continues to be that the PLO was responsible for the assassination of the U.S. Ambassador to Sudan in 1979, of which it purportedly has a tape recording of Chairman Arafat congratulating the killers for their performance. Of course, Leon Klinghoffer, the paraplegic who was pushed off the Achille Lauro in 1985, was an American citizen, and his death was just one reason why the U.S. Congress repeatedly deemed the PLO to be a terrorist organization. Yet every statute condemning the PLO and outlawing any financial assistance has been quickly repealed and replaced with declarations of support for massive foreign aid assistance.

Is then state responsibility for terrorism -- in the sense of criminal culpability -- a matter to be handled by U.S. courts? Can one even vaguely speak of a single standard when it comes to such matters, and is not the application of a single standard the absence of the rule of law? Surely, the criminal case against the two indicted Libyan agents is a case against Libya, although Libya has not been named as a defendant. Libya, on behalf of or through these agents, would surely argue that we are dealing with a political question not deserving of a court's consideration. I am not suggesting that I sympathize with that position. My aim is to point out that a criminal proceeding may suffer a fate analogous to that of the Demjanjuk proceeding -- going one step forward and two backwards.

Let us be clear. International terrorism is the flip side of aggression. Aggression is directed against states; terrorism is directed against citizens. In situations like World War II, where nations decisively and totally defeated another, a trial for aggression is possible. In all other instances, it has proved an illusory goal.

This brings us to the alternative to criminal prosecution -- civil remedies against the perpetrators of aggression and terrorism. A civil suit does not seek to replace the prospect of criminal punishment, but to recognize's its limitations -- the stretch of the canvas, if you will.

In the case of Libya and Pan Am 103, it is the contention of the American and British governments, as set forth in their criminal indictments against the two Libyan intelligence officers alleged to have planted the bombs, that the government of Libya masterminded the bombing. For over two years now, the U.S. and the U.K. have sought the surrender of these two Libyans to stand trial here or in the U.K. Ostensibly, of course, it is not the U.S. and the U.K. that are making such demands but the "international community". But, clearly, the U.N. Security Council in passing resolutions dealing with this issue, were doing so upon the strong urging of the U.S. and U.K., with little support elsewhere. Yet, after more than two years, we still seem no closer today to

realization of the goal of a criminal prosecution than we were when the indictments were handed down. Libya continues to defy U.N. Security Council resolutions calling for it to surrender the agents. And, the threat of increased sanctions seems unlikely to force Libya into a position of what it has termed national humiliation. Moreover, even if surrender of the two Libyans for trial in an American or British Court occurred, that, in itself, would hardly provide an adequate accounting. Insofar as such a trial is likely to lead to Libyan complicity, the two might choose to plea bargain to avert a trial. Without evidence or a full accounting, Libya might well escape sanctions and other state sponsors of terrorism would benefit from the lesson that in the final analysis they will not be held to account for their deeds.

What remains is the possibility of a different kind of justice through imposition of civil remedies. Let me make some suggestions for ways in which this avenue might be pursued.

1. On the macro-side, establishment of a U.N. Claims Commission to achieve compensation for the victims of international terrorism by those states determined by the U.N. Security Council to have played a role in sponsoring terrorism. This would conform with trends set in motion by the establishment of the U.N. Claims Commission for claims stemming from the Gulf War with respect to Iraqi SCUD missile attacks and would give victims of state terrorism the same new rights as the victims of aggression. Over 100 nations on behalf of thousands of individuals have already filed for compensation.

2. Amend the United States Foreign Sovereign Immunities Act of 1976 to clearly allow suits against nations for terrorist acts committed outside of the United States where Americans are involved.

Should there be a distinction between an American killed while working at his desktop computer in the World Trade Center from that of one killed while working on a laptop on an American aircraft 31,000 feet above the ground in Europe or elsewhere? Legislative efforts are underway, notably by Senator Arlen Specter and Congressman Romano Mazzoli, to strip immunity from those nations that support or conduct terrorist activities, and for those that commit acts of torture or genocide, no matter where the conduct occurs. Such efforts are to be lauded. In a ceremony at Arlington Cemetery on December 21st, President Bill Clinton stated that the attack on Pan Am Flight 103 was a deliberate attack on the United States. As such, Libya deserves no protection from a civil suit in a U.S. court.

Indeed, I believe that even without enactment of new legislation or revision of existing legislation, there exists sufficient, if not ample, ground for overcoming any sovereign

immunity defenses that may be raised by a state government charged with complicity in international terrorism. This is based, in part, on the elevation of state responsibility for terrorist acts against civilian aviation into a "jus cogens" - a binding norm of international law which overrides any limiting municipal legislation. Although the international community has been unable to arrive at a mutually-agreed-upon definition of "terrorism", certain acts are so clearly acts of terrorism, no matter what definition of terrorism one may employ. This certainly includes the act of aiding or abetting in the destruction of civilian airliner with passengers on board. A host of international conventions make this clear.

3. Institutionalize cooperation of government intelligence and law enforcement agencies, with plaintiffs in civil suits, especially where the prospect of a criminal suit arising out of the same facts seems dubious.

Even where sovereign immunity difficulties are surmounted, failure to obtain governmental cooperation in the sharing of evidence can be detrimental to successful litigating claims against governments. Nearly invariably in such instances, significant evidence is the possession of intelligence law enforcement agencies that is inaccessible to the public. Moreover, problems involving the sharing of evidence in terrorism cases with civil plaintiffs can be fairly easily resolved, where there is a will to do so. There are, after all, many cases where classified evidence can be protected as demonstrated, for example, by the U.S. Classified Information Procedures Act.

The prospect of a substantial civil judgment against a terrorist state or its agencies should be seen as a twin pillar to criminal prosecution in the efforts of the law to combatting terrorism. One canvas is apprehension, trial and conviction of the perpetrator; the other is compensation of the victim or his family. These are avenues that should be pursued in tandem, complementing one another and without one being at the expense of the other.

Fortunately, it appears that we are making progress in this direction and civil damages against state-sponsored terrorism may surrender into the realm of the possible to replace the sense of chaos and nothingness that has prevailed for too long in the law's effort to address this issue.

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approximately 14,000 undocumented immigrants in state prisons and 10,000-15,000 in country jails, about 75% from Mexico.

A prisoner transfer treaty already exists between the U.S. and Mexico. Indeed a principal cause for the absence of larger numbers of prisoners to utilize the treaty for transfers is the shortage of personnel to process the requests[2] and the discretionary rejection of many requests.

Deportation would be a more expeditious means of disposing with foreign and Mexican persons convicted of serious crimes. However the expedition would occur at the expense of the civil and due process rights of foreign prisoners, since their views on whether they want to be deported and whether they would suffer hardship would not be considered as it is in the prisoner transfer treaties.

XIII. ANTI-TERRORISM

A. Terrorism and Foreign Sovereign Immunity: The Time has Come to Remove the Terrorist's Legal Cloak

Part 1: A Call to Amend the Foreign Sovereign Immunities Act of 1976 to Permit Civil Suits Against Foreign States for Violations of *Jus Cogens* and Certain Acts of Terrorism.

By Mark S. Zaid, Esq.[3]

In the field of international commerce the rules are rapidly changing to comport with the new realities of developing technology in communication and transportation. Not so, however, with regard to international or American law as it pertains to questions of foreign sovereign immunity. Should it, for example, make a difference for purposes of jurisdiction if one were killed by a bomb while working at a desktop computer in the World Trade Center or while using a laptop computer on an American airliner at 32,000 feet above the ground?

The recent bombing of the World Trade Center harshly reminded the United States that international terrorism still continues and Americans are now vulnerable at home. Were it proven that a foreign government bore responsibility for the bombing a federal court would likely accept jurisdiction and proceed to the merits of the claim.[4] Not so in the case of 189 Americans killed above Lockerbie, Scotland when Pan Am 103 violently exploded nearly five years ago. And not so for those persons who have been tortured or held hostage at the

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[2] For a discussion of the problem of absence of personnel to process prisoner transfer requests and other problems, *see* Michael Abbell, *Proposed Policy for United States Prisoner Transfer Treaties*, 9 INT'L ENFORCEMENT L. REP. 308, 309 (1993).

[3] Mark S. Zaid practices law in Washington, D.C. where he specializes in Foreign Sovereign Immunity issues and the Freedom of Information/Privacy Acts

[4] *See* 28 U.S.C. § 1605(a)(5). This section, commonly referred to as the non-commercial tort exception, of the Foreign Sovereign Immunities Act permits suits against foreign states for torts committed within the United States.

hands of a foreign state.[1]

Justice requires that the individuals responsible for terrorist acts such as Pan Am 103 be sought out, captured and punished accordingly. Justice also demands that the rights of compensation by the victims, or their survivors, be pursued with equal vigor. Yet despite the fact that several crimes have been acknowledged as universal[2] and therefore within the criminal and civil jurisdiction[3] of every nation, American law continues to allow terrorist states to hide behind a cloak of immunity.

Prompted by attacks upon Americans abroad and the Senate's ratification of The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment[4], the Congress recently enacted legislation granting victims or their survivors the right to recover damages through the use of the U.S. judicial system for injuries incurred at the hands of individuals who committed acts of terrorism or torture.[5] Yet, despite attempts to do otherwise, the sovereignty of offending nations was kept intact thereby rendering the legislation effectively worthless. After all, notwithstanding the difficulties associated with bringing the defendants before a civil court or effecting proper service[6], what is the likelihood that the responsible individuals would be in a position to even compensate the claimants?

The current Congress will soon have the opportunity to vault one of the last remaining jurisdictional hurdles in the race against terrorists: to permit U.S. courts to adjudicate civil claims against foreign states for their terrorist acts committed against Americans abroad.

Two simultaneous efforts are underway to remove the main obstacle by amending the Foreign

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1 *See* Nelson v. Saudi Arabia, 113 S.Ct. 1471 (1993) (American tortured in Saudi Arabia); Ledgerwood v. State of Iran, 617 F.Supp. 311 (D.D.C. 1985) (American hostage taken in Iran); Persinger v. Islamic Republic of Iran, 729 F.2d 835 (D.C. Cir. 1985) (American hostage taken in Iran).

2 These include piracy, slave trade, attacks on or hijacking of aircraft, genocide, and war crimes. See RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS (hereinafter RESTATEMENT) § 404 comment a. Torture has also been recognized as having universal jurisdiction. Forti v. Suarez-Mason, 672 F.Supp 1531, 1541 (N.D.Cal. 1987)(official torture is "universal, obligatory, and definable").

3 "In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy." RESTATEMENT, § 404 comment b.

4 39 U.N. G.O.A.R. Supp. (No. 51), 23 I.L.M. 1027 (1984).

5 The Torture Victim Protection Act of 1991, 28 U.S.C. § 1350, permits suits against individuals for the crimes of torture and extrajudicial killing, but only if (1) the perpetrator was acting under actual or apparent authority, or color of law, (2) the claimant has exhausted adequate and available local remedies and (3) commences the action within 10 years after the cause of action arose.

The Antiterrorism Act of 1992, 18 U.S.C. § 2333-2338, allows U.S. nationals to seek treble damages for acts of international terrorism. The Act is not available against foreign states and additionally grants the Attorney General the authority to intervene in any civil case and stay the action if it interferes with a criminal prosecution which involves the same subject matter. Known as the "Pan Am clause," the Justice Department requested this provision in order to staff any of the family members from obtaining evidence from the U.S. Government in a civil action.

6 One needs only examine the extreme difficulties the United States and United Kingdom continue to face in their attempts to bring to trial the two Libyan intelligence officers indicted on charges of destroying Pan Am 103 on behalf of the Libyan government.

Sovereign Immunities Act of 1976 (FSIA)[6] but the chances of success are far from guaranteed due to the likelihood of State Department objection.[7]

The key provisions of the bills are listed below.

S.825

Introduced by Senator Arlen Specter, one of the leading proponents of antiterrorist legislation, in April, 1993, the bill would amend sections 1603, 1605(a) and 1610.

- Defines 'act of terrorism' in line with that of the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801, and the Antiterrorism Act of 1992, 18 U.S.C. § 2331;
- Extends provisions to include both American nationals and permanent resident aliens;
- The act could have occurred within the United States or outside the United States if money damages are sought;
- Suit must have been brought within six years after the cause of action accrued;
- Restricted to those nations designated by the Secretary of State as a state repeatedly providing support for acts of international terrorism under section 40(d) of the Arms Export Control Act[8];
- Allows for attachment of property based upon the above guidelines.

H.R. 934

The House version was introduced in February 1993 by Congressman Romano Mazzoli and seeks to amend sections 1605(a) and 1610.

- Provides recourse only for citizens of the United States;
- Personal injury or death must have occurred in the foreign state named as a defendant and as a result of "torture", "extrajudicial killing" or genocide.[9] Officials or employees of the state must have committed the act within the scope of employment. The definitions for both terms are directly lifted from TVPA;
- Claimant must have first exhausted adequate and available remedies in the place in which the conduct occurred;
- Action must have been commenced within 10 years after the cause of action accrued;
- Property may be attached regardless of whether it was involved in the act upon which the claim is based;
- Amendment is retroactive to any given time.

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6 28 U.S.C. §§ 1330, 1602-1611. FSIA sets forth "the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States." H.R. Rep. No. 1487, 94th Cong., 2d Sess., reprinted in 1976 U.S.Code Cong. & Ad.News 6604, 6610.

7 S.825, 103d Cong., 1st Sess. (1993) and H.R. 934., 103d Cong., 1st Sess. (1993). For an illustration of the objections usually raised by the U.S. Department of State, *see* Antiterrorism Act of 1990: Hearings on S.2465 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 11-25 (1990) (testimony of Allan J. Kreczko).

8 As of this writing, the list included Cuba, Iran, Iraq, Libya, North Korea, the Sudan, and Syria

9 "Torture" and "extrajudicial killing" draw their definition from the Torture Victim Protection Act. Genocide was recently added at the request of Congressman Schumer in response to pending litigation within the District of Columbia pertaining to war crimes and Nazi Germany.

Irrespective of the many problems that surround the adoption of an amendment to FSIA and regardless of the policy concerns that the Department of State may raise, we should recognize terrorists for what they are, *hostis humani generis*. America should no longer permit nations that sponsor terrorist attacks specifically designed to harm innocent civilians to protect themselves on the grounds of sovereign immunity as if they had the unquestionable discretion to undertake such activities.

Throughout the world incidents such as the destruction of Pan Am 103 or the hijacking of the Achille Lauro have been condemned. Countless treaties have been adopted by the internatinnal community allegedly seeking to punish those who violate the *jus cogens* norm of international law. Is there no substance underlying such decisions? When will the United States recognize the responsibilities outlined in the language that it has adopted and, in many circumstances, fought for?

The Ninth Circuit recently expressed the problem outright: "if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must make them so."[12]

As defined in the Vienna Convention on the Law of Treaties, a *jus cogens* norm, also known as a "peremptory norm" of international law, "is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[13] *Jus cogens* is, of course, related to customary international law. Customary international law is defined in the Restatement as the "general and consistent practice of states followed by them from a sense of legal obligation."[14]

Customary international law is ascertained by the courts "by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing the law."[15] In determining whether a norm of customary international law has risen to the level of *jus cogens*, courts should examine the same sources but must also determine whether the international community recognizes the norm as one "from which no derogation is permitted."[16]

A brief review of some of the international treaties that recognize *jus cogens* which are part of the law of the United States[17] clearly dictates that sovereign immunity should be removed at least in these specific instances. For example:

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12 Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 719 (9th Cir. 1992).

13 Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679. *See also* RESTATEMENT § 102 Reporter's Note 6.

14 RESTATEMENT § 102(2).

15 United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820); Filartiga v. Pena-Irala, 630 F.2d 876, 880-81 (2d Cir. 1980)

16 Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992), citing Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 940 (D.D.C.Cir. 1988).

17 *See* The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.")

- The Tokyo Convention ensures the State of Registration of an aircraft jurisdiction over any offense committed on board regardless of where the acts occurred.[18]
- The Montreal Convention defines specific offenses declaring, in Article 1(1), it unlawful if a person intentionally "destroys an aircraft in service ... or places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft."[19]
- Article 14 of The Torture Convention stipulates that each state party also must ensure that torture victims or their decedents "obtain... redress and ha[ve] an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible."[20]
- Also noteworthy is the New York Convention[21] and the Hostage Convention,[22] both of which have relevance to several terrorist incidences that involved Americans.

These Conventions, among others, and existing U.S. law have established the framework for protecting the rights of victims. Now all that is needed is the legislation to implement those protections rather than merely symbolize them. For those Americans who have suffered at the hands of torturers, for the family of Leon Klinghoffer, and especially for the 189 families of those Americans who perished on Pan Am 103, this should be done.

Part 2 of this article will provide a suggested amendment to FSIA and more fully explore the application of civil remedies to terrorist attacks.

XIV. CONFERENCES

A. International Criminal Investigations

On October 14, 1993, the American Bar Association's (ABA) Committee on International Criminal Law, in cooperation with the Committee on International Criminal Law of the District of Columbia Bar, will host a brown-bag lunch program from 12:00 to 1:30 pm at the ABA, 1800 M St., NW, 2d Floor, Wash., DC 20036. The panelists will be: Terry F. Lenzner, Esq., Chairman of the Investigative Group, Inc., Wash., DC; Michael J. Hershman, Esq., President, The Fairfax Group, Falls Church, VA; and Mr. Donald S. Richards, President, The Richards Group, Tuxedo Park, NY. Interested persons should contact the ABA, CJS, at (202)331-2260. There is no charge for attending the program.

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18 The Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), opened for signature Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219.

19 The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), opened for signature Sept. 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570.

20 The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), 39 U.N. GAOR Supp. (No. 51), 23 I.L.M. 1027 (1984) (emphasis added). The section continues to state "[i]n the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation."

21 The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, opened for signature Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532.

22 The International Convention against the Taking of Hostages, U.N. Resolution 34/146, annex

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